No. 17-1471	
Title:	**Home Depot U.S.A., Inc., Petitioner** **v.** **George W. Jackson**
Docketed:	April 25, 2018
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Numbers:	(17-1627)
Decision Date:	January 22, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Apr 23 2018	Petition for a writ of certiorari filed. (Response due May 25, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
May 14 2018	Motion to extend the time to file a response from May 25, 2018 to June 25, 2018, submitted to The Clerk. **Main Document**
May 18 2018	Motion to extend the time to file a response is granted and the time is extended to and including June 25, 2018.
May 22 2018	Brief amicus curiae of DRI-The Voice of the Defense Bar filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 25 2018	Brief amici curiae of Retail Litigation Center, Inc. and Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
May 25 2018	Brief amicus curiae of Product Liability Advisory Council, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jun 25 2018	Brief of respondent George W. Jackson in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 10 2018	Reply of petitioner Home Depot U.S.A., Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jul 11 2018	DISTRIBUTED for Conference of 9/24/2018.

Sep 27 2018	Petition GRANTED. In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: Should this Court's holding in Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?
Nov 09 2018	Brief of petitioner Home Depot U.S.A., Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 09 2018	Joint appendix filed. (Statement of costs filed) **Main Document** **Proof of Service** **Other**
Nov 15 2018	Brief amicus curiae of DRI-The Voice of the Defense Bar filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 16 2018	Amicus brief of Retail Litigation Center, Inc. and Chamber of Commerce of the United States of America not accepted for filing. (November 16, 2018) (Duplicate submission)
Nov 16 2018	Brief amici curiae of Retail Litigation Center, Inc., et al. filed. **Certificate of Word Count** **Proof of Service** **Main Document**
Nov 16 2018	Brief amici curiae of Washington Legal Foundation, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 28 2018	SET FOR ARGUMENT ON Tuesday, January 15, 2019
Nov 30 2018	CIRCULATED
Dec 10 2018	Brief of respondent George W. Jackson filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Record requested from the U.S.C.A. 4th Circuit.
Dec 11 2018	Record from the U.S.C.A. 4th Circuit is electronic and located on PACER.
Dec 13 2018	Record from the U.S.D.C. Western District of North Carolina is electronic and located on PACER. The record is complete.
Dec 17 2018	Brief amicus curiae of American Association for Justice filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 17 2018	Brief amicus curiae of The National Consumer Law Center filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**

Jan 08 2019	Reply of petitioner Home Depot U.S.A., Inc. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 15 2019	Argued. For petitioner: William P. Barnette, Atlanta, Ga. For respondent: F. Paul Bland, Washington, D. C.

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No. 17-___

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This action was commenced when Citibank, N.A. filed a routine state-court collection action against respondent George W. Jackson. Petitioner Home Depot U.S.A., Inc. was not a party to that action and never became a party to that collection dispute. Jackson then filed a counterclaim against Citibank asserting class-action consumer-protection claims. In addition to naming Citibank, Jackson named Home Depot and another company as original defendants to that counterclaim class action. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, permits "any defendant" in a state-court class action to remove the action to federal court if it satisfies certain jurisdictional requirements. Petitioner Home Depot is an original defendant in the class action at issue here and was never a plaintiff in any claim associated with this case. The question presented is:

Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant.

PARTIES TO THE PROCEEDINGS

Petitioner Home Depot, U.S.A., Inc. was an original defendant to the class action brought as a counterclaim in the district court and was the appellant in the court of appeals.

Respondent George W. Jackson was the original defendant and the counterclaim plaintiff in the district court and the appellee in the court of appeals.

Citibank, N.A. was the original plaintiff and the counterclaim defendant in the district court; it did not participate in the proceedings in the court of appeals; it is no longer a party to this case.

Carolina Water Systems, Inc. was an original defendant to the class action brought as a counterclaim in the district court; it did not participate in the proceedings in the court of appeals.

RULE 29.6 STATEMENT

Petitioner Home Depot U.S.A., Inc. is wholly owned by The Home Depot, Inc., a publicly traded company on the New York Stock Exchange. The Home Depot, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Home Depot U.S.A., Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 165. The opinion of the district court (Pet. App. 16a-23a) is not published in the *Federal Supplement* but is available at 2017 WL 1091367.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1441(a) provides:

> GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1453(b) provides:

> IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1)

> shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

INTRODUCTION

This petition raises "an important issue of statutory interpretation" governing the jurisdiction of federal courts and asks this Court to close "an unfortunate loophole in the Class Action Fairness Act that only the Supreme Court can now rectify." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 345 (4th Cir. 2008) (Niemeyer, J., dissenting from the denial of rehearing en banc). Congress enacted the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, to curb state-court abuses of interstate class actions by facilitating the removal of class actions by "any defendant." 28 U.S.C. § 1453(b). Home Depot is indisputably a defendant to the class-action claims asserted by respondent George W. Jackson—and that is Home Depot's *only* role in this litigation. Under the plain text of CAFA, Home Depot is therefore indisputably "any defendant" and is entitled to remove the class-action claims against it. But every court of appeals to consider the question presented has held that a defendant like Home Depot cannot remove the class-action claims against it because it was not an original defendant in a routine collection action between other parties. From the perspective of ordinary statutory construction, that conclusion makes no sense.

Although ordinarily the absence of a circuit conflict is a reason to deny a petition for a writ of certiorari, in this case the opposite is true: the unanimity

among courts of appeals in embracing a counter-textual interpretation of Section 1453(b) requires this Court's immediate intervention because the circuit courts view broad language in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), as *requiring* them to adopt that nonsensical construction. Only this Court can clarify the scope of *Shamrock Oil* and restore to CAFA its plain meaning.

CAFA is a statute that governs the removal of class actions. It authorizes "any defendant" in a qualifying class action to remove the class action to federal court. Congress could not have used simpler or more straightforward language to give "any" class-action defendant a right of removal. Home Depot is a class-action defendant in a state-court forum it did not choose. It should be able to remove the class action under CAFA. But without this Court's intervention, it will continue to be trapped in state court defending against class-action claims that Congress intended to be heard in federal court. The Court should grant this Petition to correct that injustice.

STATEMENT

1. a. The general removal statute provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by *the defendant or the defendants*, to the [appropriate] district court of the United States." 28 U.S.C. § 1441(a) (emphasis added). In *Shamrock Oil & Gas Corp. v. Sheets*, this Court interpreted the predecessor to Section 1441(a), which authorized removal of a state-court action "of which the district courts of the United States are given original jurisdiction" when removal was sought "by the

defendant or defendants therein." 313 U.S. 100 (1941) (quoting 28 U.S.C. § 71 (1940)). The Court held that that provision did not authorize removal of a counterclaim by a party who was the original plaintiff (and counterclaim defendant) in the state-court action. *Id.* at 104-109. The Court explained that the removal provision in place from 1875 to 1887 had authorized removal by "either party"—but that essentially every other removal statute enacted since 1789 had limited "the privilege of removal to 'defendants' alone." *Id.* at 105; *id.* at 105-106. The Court viewed the "alterations in the statute" to be of "controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal," *id.* at 107, and "to restrict the jurisdiction of the federal courts on removal," *id.* at 108. Concluding that the removal provision must be subject to a "strict construction," the Court found "no basis for saying that Congress, by omitting from the [operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Ibid.*

b. In 2005, Congress enacted CAFA to address what it perceived as "abuses" of the class-action system. S. Rep. No. 109-14, at 4 (2005) (Senate Report). In particular, the Senate Report explained that Congress was concerned that "most class actions" were being "adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." *Ibid.* The Senate Report observed that existing "law enable[d] lawyers to 'game' the procedural rules and keep nationwide or multi-state class

actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests"—and that, as a result, "consumers are the big losers." *Ibid.* To address those problems, Congress amended the provisions governing federal diversity jurisdiction over class actions. As relevant here, Congress "modifie[d] the federal removal statutes to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts if any of the defendants so desire." *Id.* at 5; *see id.* at 6 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses . . . .").

By enacting CAFA, Congress sought to change existing laws that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." Senate Report 10. "In order to enable more class actions to be removed to federal court," Congress therefore enacted 28 U.S.C. § 1453(b), which provides for removal of class actions (under broader diversity jurisdiction established by other parts of CAFA) "by any defendant without the consent of all defendants." Senate Report 29. In construing CAFA's application to removal proceedings, this Court has noted that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

2. a. This case arises out of a debt-collection action filed in June 2016 in North Carolina state court by Citibank, N.A. against respondent Jackson. Pet.

App. 2a. Citibank alleged that Jackson had failed to pay for a water-treatment system he purchased using a Citibank-issued credit card. *Id.* at 2a-3a.

In his August 2016 answer to the complaint, Jackson asserted a class-action counterclaim against plaintiff Citibank and against petitioner Home Depot and Carolina Water Systems, Inc. (CWS), neither of which was a party to the original collection action. Pet. App. 2a. Jackson alleged that Home Depot and CWS had engaged in unfair and deceptive trade practices by misleading consumers about the water-treatment systems sold by CWS as part of an agreement with Home Depot and that Citibank was jointly and severally liable because Home Depot "directly sold or assigned the transaction to Citibank." *Id.* at 3a (citation omitted). In September 2016, Citibank voluntarily dismissed its collection claims against Jackson without prejudice. *Ibid.*

In October 2016, Home Depot filed a notice of removal, relying on CAFA. Pet. App. 3a. Because the only controversy remaining in the case was the class action filed by Jackson, Home Depot then filed a motion to realign the parties to denominate Jackson as plaintiff and Home Depot, CWS, and Citibank as defendants. *Ibid.* On November 8, 2016, Jackson filed a motion to remand. *Ibid.* On November 18, Jackson amended his class-action complaint to remove any reference to Citibank. *Ibid.* At that point, the only remaining controversy was Jackson's class-action claims against Home Depot and CWS, neither of which was a plaintiff in (or even a party to) the original debt-collection action filed in state court by Citibank.

In March 2017, the district court denied Home Depot's motion to realign the parties, explaining that

"[t]his is not a situation where there are antagonistic parties on the same side" and noting that Citibank had "dismissed its claim against Jackson *without prejudice*." Pet. App. 22a. The court also granted Jackson's motion to remand, reasoning that, because Home Depot was not an original defendant in the collection action that started the case, it was not entitled to remove what remained of the case (*i.e.*, the class action). Pet. App. 19a-21a.

b. Home Depot appealed, and the court of appeals affirmed. Pet. App. 1a-15a.

The court of appeals first affirmed the district court's remand order. Pet. App. 4a-14a. The court explained that 28 U.S.C. § 1441(a) limits the right of removal to "the defendant or the defendants." Pet. App. 4a. Relying on *Shamrock Oil*, which construed similar language, the court held that Section 1441(a) does not authorize removal by a defendant to a claim asserted as a counterclaim—even when that defendant was not an original plaintiff in the suit. *Id.* at 4a-9a.

The court of appeals rejected Home Depot's argument that CAFA, which allows removal by "any defendant," 28 U.S.C. § 1453(b), expands the class of defendants who can remove a case to include an original defendant to a class action asserted as a counterclaim when the defendant was not an original plaintiff (or any kind of plaintiff) in the case. Pet. App. 8a-14a. The court relied on circuit precedent—and decisions from two other circuits—holding that CAFA does not permit removal by a defendant to a counterclaim even when the defendant was not an original plaintiff. *Id.* at 7a (citing *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355-356 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *Westwood Apex v. Contreras*,

644 F.3d 799 (9th Cir. 2011); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 334-336 (4th Cir. 2008)). The court further rejected Home Depot's argument that this Court's decision in *Dart Cherokee Basin Operating Co.*, *supra*—which clarified that CAFA eliminates any antiremoval presumption for covered class actions—undermines the viability of those circuit court decisions. *Id.* at 9a-11a.

The court of appeals also rejected Home Depot's argument that the holdings of *Shamrock Oil* and of the circuit cases applying CAFA to counterclaim defendants do not apply to Home Depot because it is not a counter-defendant or a third-party defendant, but is simply a defendant in the only dispute remaining in this case. Pet. App. 11a-14a. In so holding, the court relied on the fact that, at the time Home Depot filed its notice of removal, Jackson had not yet dismissed his claims against Citibank (the original plaintiff). *Id.* at 12a. The court reasoned that accepting Home Depot's argument would permit gamesmanship because it would permit an original plaintiff to remove an otherwise unremovable counterclaim class action by dismissing its original claims. *Id.* at 13a-14a.

Finally, the court of appeals affirmed the district court's refusal to realign the parties. Pet. App. 14a-15a. Although the court acknowledged that it employs a "'principal purpose' test, in which [the court] determine[s] the primary issue in controversy and then align[s] the parties according to their positions with respect to that issue," *id.* at 14a, it refused to make such an alignment in this case because no party was attempting to evade limits on diversity jurisdiction, *id.* at 15a.

REASONS FOR GRANTING THE WRIT

This is the rare case that warrants this Court's review absent a circuit conflict because courts of appeals have unanimously agreed that broad language in this Court's decision in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941), requires a holding that the plain language of 28 U.S.C. § 1453(b) cannot mean what it says. That broad language, if taken literally, greatly expands the holding of *Shamrock Oil* beyond its reasoning and far beyond the question actually presented in that case. Because courts of appeals take seriously this Court's admonitions that they must take this Court's decisions at face value unless or until this Court says otherwise, they are not free to construe the words of Section 1453(b) in their ordinary sense—and will not be free to do so unless or until this Court intervenes to clarify the reach of *Shamrock Oil*. This Court's intervention is warranted at this time to correct the circuit courts' errant course in this area. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1311 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that the Court granted certiorari "despite the absence of a circuit conflict" to clarify the meaning of the Court's own precedents).

I. This Court Should Grant Review To Correct The Courts Of Appeals' Erroneously Broad Interpretation Of *Shamrock Oil*.

The question presented in *Shamrock Oil* was whether the general removal statute authorized an original plaintiff in a state-court action to remove that action to federal court based on a counterclaim asserted by the defendant. 313 U.S. at 102-104. The answer was no. *Id.* at 106-109. That is *not* the question

presented in this case because this case does not involve removal by a plaintiff and does not involve removal under the general removal statute or under a statute employing the same limiting language as the general removal statute. Nevertheless, every court of appeals to consider the question presented (four so far) has held that the question whether an original counterclaim defendant can remove a class action under CAFA is controlled by broad language in *Shamrock Oil* that cannot mean what it says. This Court should grant this Petition to clarify the reach of *Shamrock Oil* and to restore to CAFA its plain and ordinary meaning.

A. Only This Court Can Clarify The Scope Of *Shamrock Oil*.

1. In construing the predecessor to today's general removal statute, this Court held in *Shamrock Oil* that a plaintiff in a state-court action cannot remove that action to federal court under the general removal provision in response to a counterclaim. 313 U.S. at 104-109. In so holding, the Court relied on the text and purpose of the operative statute. Although neither the text nor purpose of that statute corresponds to the text and purposes of CAFA, courts of appeals have felt bound to apply *Shamrock Oil* to the question presented because the Court used broad language in describing the holding of *Shamrock Oil*.

The removal provision at issue in *Shamrock Oil*—like the general removal provision in operation today, 28 U.S.C. § 1441(a)—authorized removal "by the defendant or defendants" when certain other requirements were met. 313 U.S. at 104 & n.1 (quoting 28 U.S.C. § 71 (1940)); *see* 28 U.S.C. § 1441(a)

(authorizing removal by "the defendant or the defendants"). In analyzing the text, the Court focused on the phrase "by the defendant or defendants," which established a limit on the scope of removal that had not existed in a predecessor statute. 313 U.S. at 104-106. The 1875 version of the general removal statute, the Court explained, had permitted removal by "either party, or any one or more of the plaintiffs or defendants" when other conditions were satisfied. *Id.* at 106 (quoting Act of Mar. 3, 1875, ch. 137, § 3, 18 Stat. 470, 471). Congress amended that provision in 1887 to limit the right of removal to "the defendant or defendants," Act of Mar. 3, 1887, ch. 337, § 1, 24 Stat. 552, 553, a limitation that remained in the version of the statute at issue in *Shamrock Oil* and continues in nearly identical form today, *see* 28 U.S.C. § 1441(a) (limiting removal to "the defendant or the defendants").

Relying on the House Report that accompanied the 1887 Act, the Court explained that the purpose of the amendment was "to narrow the federal jurisdiction on removal" by "'requir[ing] the plaintiff to abide his selection of a forum'" when a plaintiff sues in state court. *Shamrock Oil*, 313 U.S. at 106 n.2, 107 (quoting H.R. Rep. No. 49-1078, at 1 (1886)). In light of that statutory purpose, the Court construed the statute's restriction of removal authority to "the defendant or defendants" *not* to include an original plaintiff who later became a counterclaim defendant. *Id.* at 106-109. Such a party, although technically a defendant to the counterclaim, could not be considered "the defendant" in the case because that party had *chosen* the state-court forum and was not an original defendant—*i.e.*, was not "the defendant or defendants." *Id.* at 107-

108. The Court thus found "no basis for saying that Congress, by omitting from the [then-operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Id.* at 108.

2. Understood that way, the holding of *Shamrock Oil* does not control the question presented in this case—because Home Depot was not the original plaintiff, did not choose the state-court forum, cannot be considered a plaintiff in any aspect of this case, and did not seek removal under 28 U.S.C. § 1441(a) or under any other statutory provision that limits removal authority to "the defendant or the defendants." Because *Shamrock Oil* uses unnecessarily broad language in describing its holding, however, courts of appeals have felt bound to construe that decision broadly. As a result, those courts have held that removal can be accomplished *only* by a party that is a defendant to the original plaintiff's state-court action—and that *Shamrock Oil* requires that result. As Judge Bybee explained in a concurring opinion, "[o]ver time, the holding of *Shamrock Oil*—that an original plaintiff could not remove the case after a counterclaim was filed—transformed into a rule that only the original defendant could remove the case." *Westwood Apex v. Contreras*, 644 F.3d 799, 808 (9th Cir. 2011). Courts of appeals have thereby extended the holding of *Shamrock Oil* far beyond the circumstances of that case—and well beyond the reasoning of that case—to prohibit removal by a party that was involuntarily brought into a state-court action as a defendant when that party is a defendant to a counterclaim.

3. "For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant

removal power under § 1441(a) to third-party defendants." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008). As explained, that extension of *Shamrock Oil* is questionable. But that is not the subject of this Petition. In recent years, four courts of appeals have taken their extension of *Shamrock Oil* even further, viewing that decision as controlling the construction of a *different* (non-general) removal statute that uses *different* wording.

The Fourth, Sixth, Seventh, and Ninth Circuits have held that a third-party defendant to a class-action counterclaim may not remove the class action under CAFA because, although such a party is undoubtedly a defendant to the class action, under *Shamrock Oil* it cannot be considered "any defendant" under CAFA, 28 U.S.C. § 1453(b). Those courts have justified that counter-textual holding by explaining that *Shamrock Oil* construed the term "defendant" in the general removal provision rather than the more specific term "the defendant." *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex*, 644 F.3d at 804-805 (9th Cir.); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.); *see also First Bank v. DJL Props., LLC*, 598 F.3d 915, 917 (7th Cir. 2010) (using same reasoning with respect to class-action defendant that was original plaintiff).

Thus, for example, the Ninth Circuit held in *Westwood Apex* that a party that was a counterclaim defendant (but not a plaintiff in any capacity) could not remove a class action pursuant to CAFA because *Shamrock Oil* "established [the] meaning of 'defend-

ant' in Chapter 89 of the Judicial Code." 644 F.3d at 804. Because in that court's view the "accepted understanding of 'defendant' as excluding plaintiff/counterclaim defendants and third-party defendants" was established by *Shamrock Oil*, it viewed as irrelevant that CAFA modifies the term "defendant" with the adjective "any" rather than the definite article "the." *Id.* at 805. The Seventh Circuit similarly held that a counterclaim defendant that plays no other role in the litigation (*i.e.*, is not a plaintiff, no matter how broadly that term is construed) cannot be considered "the defendant" under 28 U.S.C. § 1441 or "any defendant" under CAFA, *id.* § 1453(b), because *Shamrock Oil* "established" the meaning of "the term 'defendant.'" *Tri-State Water Treatment*, 845 F.3d at 355. The same is true of the Fourth and Sixth Circuits. Pet. App. 9a; *In re Mortg. Elec. Registration Sys.*, 680 F.3d at 853; *Palisades*, 552 F.3d at 335. In the decision below, the Fourth Circuit expressly stated that it could not permit removal in this case because this Court has not "abandoned *Shamrock Oil*'s definition of 'defendant' in the class action context." Pet. App. 9a.

Although the circuit courts' understanding of the holding of *Shamrock Oil* extends beyond both the question presented and the statutory text at issue in *Shamrock Oil*, it has some basis in the literal wording of the Court's opinion. In the course of explaining the evolution of the general removal statute, for example, the Court noted that Congress had for the most part "given the privilege of removal to 'defendants' alone." *Shamrock Oil*, 313 U.S. at 105. The Court also reasoned that Congress intended "to narrow the federal jurisdiction on removal" when it "omi[tted]" "the phrase 'either party'" and "substitut[ed] for it . . . the

phrase authorizing removal by the 'defendant or defendants' in the suit." *Id.* at 107; *see ibid.* (noting that the general removal statute required "that the removal petition be filed by the 'defendant' at or before the time he is required to plead in the state court"). By repeatedly purporting to interpret the term "defendant" rather than the full statutory term "*the* defendant," the Court in *Shamrock Oil* perhaps unwittingly constrained lower courts' ability to interpret the word "defendant" when used with a different modifier.

Significantly, the Court in *Shamrock Oil* had no occasion to consider whether the statutory term "the defendants" would encompass a party who was not an original plaintiff, did not voluntarily submit itself to the jurisdiction of the state court on a claim that could be heard in federal court, and could not be described as a "plaintiff" in any sense of that word. Moreover, none of the reasoning the Court employed to explain its holding that an original *plaintiff* could not remove a case under the general removal statute would apply to a party that was brought into a matter through service of process as an original defendant to a counterclaim: such a party did not select the state-court forum, *Shamrock Oil*, 313 U.S. at 106 n.2, and permitting removal by such a party would not "save a right of removal to some plaintiffs and not to others," *id.* at 108.

Because courts of appeals are not free to narrowly construe broad language in this Court's opinions, even when there is reason to believe that this Court might do so, they will continue to erroneously restrict removal authority unless this Court steps in to clarify the limits of *Shamrock Oil*. In his dissenting opinion in *Palisades*, Judge Niemeyer explained that "reading

'defendant' consistently does not mean [a court] must read '*any* defendant' in § 1453(b) the same as '*the* defendant or *the* defendants' in § 1441(a)." 552 F.3d at 340. But Judge Niemeyer also explained (in the course of dissenting from the denial of rehearing en banc in that case) that "only the Supreme Court" will be able to "rectify" courts of appeals' error in construing the phrase "any defendant" in CAFA. *Id.* at 345; *see Tri-State Water Treatment*, 845 F.3d at 356 ("If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move."). Judge Bybee, in his concurring opinion in *Westwood Apex*, similarly explained that, although the holding of *Shamrock Oil* has been interpreted to restrict removal to a defendant to a claim by the original plaintiff, "*Shamrock Oil*'s rationale" "does not compel" that result. 644 F.3d at 807-808. The Court should grant this Petition to hold exactly that.

B. The Courts Of Appeals Have Misconstrued An Important Statute Governing The Jurisdiction Of Federal Courts.

Congress enacted CAFA because the existing "diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses" by preventing large class actions from being adjudicated in federal court. Senate Report 6. Because existing "law enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court," *id.* at 10, Congress eased the requirements of removal in the hope of "minimiz[ing] the class action abuses taking place in state courts and ensur[ing] that these cases can be litigated in a proper forum," *id.* at

27; *see id.* at 26 ("Under current law, . . . plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level."). The decision below—and the similar decisions of the Sixth, Seventh, and Ninth Circuits—significantly undermines Congress's purpose by creating a giant "loophole" in CAFA's protections "that only [this] Court can now rectify." *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc). Indeed, one commenter has noted that the term "'loophole' may not be an adequate term" because the "rule adopted by" the courts of appeals "is tantamount to a determination that CAFA's removal provision simply has no application to the very substantial proportion of class actions that can be pleaded as counterclaims." Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, at 2 (Himmelfarb).

The courts of appeals' narrow interpretation of removal authority under CAFA has no basis in the text of that statute or of any related removal provision. As always, statutory interpretation must begin with the plain text of a statute, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)) (brackets in original). In that endeavor, the Court has emphasized that it "must enforce plain and unambiguous statutory language according to its terms." *Ibid.*

As relevant here, CAFA provides that a class action satisfying certain jurisdictional requirements "may be removed to a district court of the United

States in accordance with" 28 U.S.C. § 1446, "except that such action may be removed *by any defendant* without the consent of all defendants," *id.* § 1453(b) (emphasis added). Section 1453(b) departs from Section 1441(a)'s grant of removal authority in significant respects. Whereas Section 1441(a) restricts removal power to "the defendant or the defendants," *id.* § 1441(a), Section 1453(b) permits removal by "any defendant," *id.* § 1453(b). "[U]sually at least, when [this Court is] engaged in the business of interpreting statutes [the Court] presume[s] differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017). "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (quoting *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969) (en banc)). In contrast, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Accordingly, "Congress' use of 'any' to modify '[defendant]'" in CAFA "is most naturally read to mean [defendants] of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). It cannot be gainsaid that Home Depot is a defendant "of whatever kind" in this matter—in fact, its *only* role in this litigation is as a defendant to class-action claims. Under the plain meaning of Section 1453(b), therefore, Home Depot should have been permitted to remove this case to federal court.

The reasons offered by the courts of appeals to support their contrary conclusions are not persuasive. First, because those courts have construed *Shamrock Oil* as defining the word "defendant" for purposes of all removal statutes—but not for other purposes (*see, e.g.*, references in Federal Rule of Civil Procedure 12 to "A defendant" and "the defendant," which necessarily include Home Depot)—they have felt bound to ignore the plain meaning of the phrase "any defendant." *See, e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354 (relying on explanation in *First Bank*, 598 F.3d at 917, that "'[a]ny' is inclusive, to be sure, but the word that it modifies remains 'defendant' [as defined] under *Shamrock Oil*."). The Seventh Circuit has explained that, "[i]f the drafters of [CAFA] wanted to negate *Shamrock Oil*, they could have written 'defendant (including a counterclaim defendant)'" but instead "chose the unadorned word 'defendant,' a word with a settled meaning." *First Bank*, 598 F.3d at 917; *see Tri-State Water Treatment*, 845 F.3d at 354 ("*First Bank* does much of the work that is necessary to resolve the present appeal."). This Court has expressly rejected that type of could-have reasoning to circumvent the plain meaning of statutory text. In the course of interpreting the phrase "any other law enforcement officer" in *Ali*, this Court explained:

> Petitioner would require Congress to clarify its intent to cover all law enforcement officers by adding phrases such as "performing any official law enforcement function," or "without limitation." But Congress could not have chosen a more all-encompassing phrase than "any other law enforcement officer" to express that intent. We have no reason to demand

> that Congress write less economically and more repetitiously.

Ali, 552 U.S. at 221. So too here: there is no reason to demand that Congress specify each type of defendant who may remove under CAFA when Congress has already specified that *any defendant* may remove under CAFA. Home Depot is a defendant. The Seventh Circuit's reasoning is particularly out of step in this case—as it was in *Tri-State Water Treatment*—because Home Depot is not even a counterclaim defendant. Because Home Depot is not a plaintiff, Jackson's class-action claims against Home Depot are not "counter" to anything—they are simply class-action claims and Home Depot is simply the defendant to those claims under any ordinary meaning of that term. *See* Fed. R. Civ. P. 12.

Second, courts of appeals have reasoned that the word "defendant" in Section 1453(b) must be construed to mean the same thing that it means in 28 U.S.C. § 1446(b), which sets forth the procedures for removal and uses the phrase "the defendant." *See, e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354; *Westwood Apex*, 644 F.3d at 806; *Palisades*, 552 F.3d at 334-335. That explanation makes little sense in light of Section 1453(b)'s express instruction that courts should *depart* from the default rules in Section 1446(b). Section 1453(b) provides that a class action may be removed "in accordance with" Section 1446 "*except that* such action may be removed by *any defendant* without the consent of all defendants." 28 U.S.C. § 1453(b) (emphases added). Congress could not have been clearer in expressing its intent to establish removal authority for class actions that is *different* in scope from the

general removal authority set forth in Sections 1441 and 1446.

Some courts of appeals, including the court below, Pet. App. 7a (citing *Palisades*, 552 F.3d at 335), have dismissed Congress's use of an "except" clause by noting that the phrase following "except" has effect of departing from Section 1446's baseline rule that a defendant cannot remove a case without the consent of all other defendants. It is true that part of the text that follows "except" accomplishes that goal—by specifying that a defendant can remove an eligible class action "without the consent of all defendants." 28 U.S.C. § 1453(b). But Congress *also* used the phrase "any defendant" to describe the degree to which CAFA removal is "except[ed]" from the background removal principals. The introduction of the phrase "any defendant" (rather than "the defendant" as used in Sections 1441(a) and 1446(b)) would have no purpose—indeed, would be superfluous—if Congress's only goal was to depart from the unanimity rule, a goal it accomplished unambiguously with different statutory text.

Finally, the court of appeals justified its countertextual reading of "any defendant" by hypothesizing that construing the phrase "any defendant" to include any defendant as that term is ordinarily understood would "invite gamesmanship" by permitting a class action defendant that was an original plaintiff "to disrupt unfavorable proceedings in state court." Pet. App. 13a. That reasoning is wrong for two reasons. First, it ignores that Congress's purpose in enacting CAFA was to permit "any" class-action "defendant" to disrupt unfavorable state-court class-action proceedings. As this Court recently explained in *Dart Cherokee Basin Operating Co. v. Owens*, any anti-removal

presumption that might exist with respect to ordinary diversity jurisdiction does not "attend[] cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. 547, 554 (2014). Second, as explained more fully below, the rule adopted by four courts of appeals invites gamesmanship by class-action plaintiffs, not by class-action defendants. A wily plaintiffs' attorney need only wait for a potential class-action defendant—or, as here, for any other party loosely affiliated with such a potential defendant—to file a run-of-the-mill state-court collection action that can then be transformed into a vehicle for a non-removable interstate class action. That cannot be what Congress intended when it enacted CAFA—and it cannot be what this Court intended when it decided *Shamrock Oil*.

II. The Question Presented Is Important And Recurring.

The question presented is exceedingly important. CAFA has been described as "the most significant legislative reform of complex litigation in American history." Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008). But the decisions of the Fourth, Sixth, Seventh, and Ninth Circuits provide a roadmap for circumventing the clear purpose of the Act. A plaintiffs' attorney need not even be particularly enterprising to find a debt-collection proceeding or other minor state-court litigation to use as a vehicle for asserting an interstate class-action claim against an entity that is not even a party to the state-court action. The risk of such behavior is particularly high for class actions asserting consumer-protection claims—a category that comprises a significant percentage of all class actions eligible for federal

jurisdiction. Himmelfarb 2. From the perspective of that class-action defendant, the commencement of a class action as a counterclaim is no different from the commencement of a stand-alone state-court class action—*except* that the counterclaim class action is not removable under the prevailing view of CAFA.

Experience shows that the "unfortunate loophole" Judge Niemeyer warned about in his dissenting opinion in *Palisades*, 552 F.3d at 345, has significantly undermined the goals of CAFA. Shortly after CAFA was enacted, a consultant who advised the class-action plaintiff (*i.e.*, the original defendant) in *Palisades* published a law review article encouraging class-action lawyers to exploit this loophole by filing their claims as counterclaims. Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) (Tidmarsh). The author explains that "a consumer wishing to hold onto the state forum" for his class-action claim can evade CAFA's removal provisions by "filing a counterclaim class action." *Id.* at 198. Using that "tactic," the article boasts, "the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake." *Id.* at 199. The author noted that, although that tactic had already been employed a number of times in the first two years after CAFA's enactment, those cases represented "just the tip of an approaching iceberg." *Ibid.* He was right. State courts have seen a proliferation of consumer-protection class actions filed as counterclaims in

ordinary collection actions, foreclosures, and contract disputes.*

The stakes for retailers such as Home Depot are high. Home Depot did not choose the state-court forum in this case and had no control over whether or where the original plaintiff filed its collection action. But because Jackson used the counterclaim tactic to avoid the removal jurisdiction that CAFA affords, Home Depot is stuck litigating a large class action in a state court of someone else's choosing. Indeed, this is the second class action filed against Home Depot in less than a year that uses this removal-avoiding technique—and the other one was filed in Madison County, Illinois, one of the jurisdictions Congress identified as a "'magnet' jurisdiction[]" for abusive class actions. Senate Report 13; *Tri-State Water Treatment*, 845 F.3d at 352. The stakes for financial institutions are just as high. As the class-action consultant warned in his 2007 article, "financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies" against class-action claims. Tidmarsh 199. In this very case, Citibank (the original plaintiff) ultimately abandoned its

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* For just a few recent examples, see, *e.g.*, *Ford Motor Credit Co. v. Jones*, — S.W.3d —, 2018 WL 1384505, at *2 (Mo. Ct. App. Mar. 20, 2018); *Credit Acceptance Corp. v. Hinton*, 2018 WL 793934, at *1 (Conn. Super. Ct. Jan. 16, 2018); *Midland Funding, LLC v. Raney*, 93 N.E.3d 724, 736 (Ill. App. Ct. 2018); *Polito v. Keybank Nat'l Ass'n*, 237 So. 3d 361, 362 (Fla. Dist. Ct. App. 2017); *Dupreez v. GMAC, Inc.*, 2017 WL 6016592, at *2 (Md. Ct. Spec. App. Dec. 5, 2017); *Epps v. Bank of Am. N.A.*, 2017 WL 5513258, at *1 (Md. Ct. Spec. App. Nov. 17, 2017); *Bank of Am. v. All About Drapes, Inc.*, 2017 WL 4127489, at *4 (Ill. App. Ct. Sept. 15, 2017).

collection action to avoid being enmeshed in the state-court class action. Class actions were not created for the purpose of deploying that type of coercive pressure—and Congress certainly did not intend to facilitate such behavior when it cracked down on class-action abuses by enacting CAFA.

This Court's immediate intervention is warranted to correct the courts of appeals' counter-textual interpretation of CAFA's removal provision. This Court has denied review on this issue several times. But the problem is not resolving itself—and it will neither resolve itself nor ripen into to a circuit split because courts of appeals view their erroneous interpretation of CAFA as compelled by this Court's broad language in *Shamrock Oil*. Only this Court can clarify the scope of its holding in *Shamrock Oil* and restore CAFA to its intended role in stemming class-action abuses in state courts.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 23, 2018

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1627

GEORGE W. JACKSON,
Third Party Plaintiff – Appellee,

v.

HOME DEPOT U.S.A., INCORPORATED,
Third Party Defendant – Appellant,

and

CAROLINA WATER SYSTEMS, INC.;
CITIBANK, N.A., Defendants.

Appeal from the United States District Court
for the Western District of North Carolina,
at Charlotte. Graham C. Mullen, Senior District
Judge. (3:16-cv-00712-GCM)

Argued: December 5, 2017
Decided: January 22, 2018

Before NIEMEYER, SHEDD and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Niemeyer and Judge Shedd joined.

* * *

DUNCAN, Circuit Judge:

Third-Party Defendant Home Depot U.S.A., Inc., filed a Petition for Permission to Appeal the district court's order remanding this case to state court. This court deferred ruling on Home Depot's Petition for Permission to Appeal pending consideration of the merits of the appeal. Home Depot argues that it is entitled to remove the class action counterclaim against it despite Fourth Circuit precedent to the contrary because either the Supreme Court has called this precedent into question or it is distinguishable here. Home Depot also appeals the district court's denial of its motion to realign the parties.

We grant Home Depot's Petition for Permission to Appeal. For the reasons that follow, we affirm both the district court's decision to remand this case to state court and its denial of Home Depot's motion to realign the parties.

I.

On June 9, 2016, Citibank, N.A., filed a debt collection action against George W. Jackson in the District Court Division of the General Court of Justice of Mecklenburg County, North Carolina. Citibank alleged that Jackson failed to pay for a water treatment system he purchased using a Citibank-issued credit card. On August 26, 2016, Jackson filed an Answer in which he asserted a counterclaim against Citibank and third-party class action claims against Home Depot and Carolina Water Systems, Inc. ("CWS").

Jackson alleged that Home Depot and CWS engaged in unfair and deceptive trade practices by misleading customers about their water treatment systems, and that Citibank was jointly and severally liable to him because Home Depot "directly sold or assigned the transaction to" Citibank. J.A. 51. On September 23, 2016, Citibank voluntarily dismissed its claims against Jackson without prejudice.

Home Depot filed a notice of removal on October 12, 2016, citing federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA"). Home Depot asserted that its notice of removal was timely under 28 U.S.C. § 1446(b) because it was filed within thirty days of its September 12, 2016, receipt of Jackson's counterclaim. On October 28, 2016, Home Depot moved to realign the parties with Jackson as plaintiff and Home Depot, CWS, and Citibank as defendants. On November 8, 2016, Jackson moved to remand. On November 18, 2016, Jackson amended his third-party complaint to remove any reference to Citibank.

The district court denied Home Depot's motion to realign because it concluded that this was not a case "where there are antagonistic parties on the same side," and granted Jackson's motion to remand because Home Depot did not meet the removal statute's definition of "defendant." *See Citibank, N.A. v. Jackson*, No. 3:16-CV-00712-GCM, 2017 WL 1091367, at *2-4 (W.D.N.C. Mar. 21, 2017).

II.

We review de novo the district court's decision to remand to state court. *See Quicken Loans Inc. v. Alig*, 737 F.3d 960, 964 (4th Cir. 2013). We also review de novo the district court's refusal to realign the parties,

but review the district court's factual determinations on this point for clear error. *See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 872-73 (9th Cir. 2000).

Under the general removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction[] may be removed by the defendant or the defendants" to the appropriate district court. 28 U.S.C. § 1441(a). Section 1446 establishes the procedure for removal under § 1441 and other sections.

In *Shamrock Oil & Gas Corp. v. Sheets*, the Supreme Court concluded that the predecessor to § 1441 did not permit an original plaintiff to remove a counterclaim against it. 313 U.S. 100, 108 (1941). The Court contrasted the statute, which authorized removal "by the defendant or defendants therein," with other statutes that had allowed removal by "either party," and held that Congress's choice of words indicated "the Congressional purpose to narrow the federal jurisdiction on removal." *See id.* at 104, 107. While § 1441 was not before the Court in *Shamrock Oil*, § 1441 uses similar language to its predecessor and allows removal by "the defendant or the defendants." Courts therefore interpret § 1441 in accordance with *Shamrock Oil*. *See, e.g.*, *Westwood Apex v. Contreras*, 644 F.3d 799, 805 (9th Cir. 2011); *First Nat'l Bank of Pulaski v. Curry*, 301 F.3d 456, 462-63 (6th Cir. 2002).

Congress, however, has expanded removal authority for class actions. It enacted CAFA "to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state

courts." *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 952 (9th Cir. 2009). To that end, CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules.

Section 1453(b) states that a class action filed in state court may be removed "in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether *any defendant* is a citizen of the State in which the action is brought, except that such action may be removed by *any defendant* without the consent of all defendants." 28 U.S.C. § 1453(b) (emphases added). Section 1453(b) thus refers to § 1446, which establishes the procedures for removal.

This court has interpreted § 1453(b) to eliminate three of the traditional limitations on removal. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 331 (4th Cir. 2008) (citing *Progressive W. Ins. Co. v. Preciado*, 479 F.3d 1014, 1018 n.2 (9th Cir. 2007)). First, it eliminates the rule that the defendant cannot remove a case filed in its home forum. *Id.* Second, it eliminates the rule that a defendant cannot remove a case that has been pending in state court for more than one year. *Id.* Third, it eliminates the rule requiring unanimous consent of all defendants for removal. *Id.*

This court has also held that CAFA's expanded removal authority does not allow removal of a class action counterclaim asserted against an additional counter-defendant.[1] *See id.* at 336. *Palisades* ad-

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[1] *Palisades* described a defendant, not the original plaintiff, named in a counterclaim as an "additional counter-defendant," and we adopt that language here. Home Depot's caption in this

dressed facts similar to those presented here,[2] and concluded that an additional counter-defendant was not "the defendant or the defendants" with removal authority under § 1441(a). *Id.* First, *Palisades* applied *Shamrock Oil* and held that an additional counter-defendant was not "the defendant or the defendants" because it was not a defendant against whom the original plaintiff asserted a claim. *Id.* Second, it emphasized that "Congress has shown the ability to clearly extend the reach of removal statutes to include counter-defendants, cross-claim defendants, or third-party defendants," but § 1441(a) refers only to "the defendant or the defendants," which supports a narrow view of removal under that provision. *Id.* at 333-34. Third, it observed that this conclusion was consistent with the obligation to construe removal jurisdiction strictly. *Id.*

Palisades also held that an additional counter-defendant was not "any defendant" entitled to removal

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case is "Third Party Defendant," but any suit by a defendant against the plaintiff, including any properly joined claims, is a counterclaim. *Id.* at 329 n.1. A counter-defendant need not also be the original plaintiff. *Id.*

[2] In *Palisades*, the plaintiff initiated a collection action in state court to recover unpaid charges plus interest owed on a cell-phone service contract. *Id.* at 329. The original defendant filed an answer denying the complaint's allegations and asserting a counterclaim against the original plaintiff. *Id.* The original defendant later filed an amended counterclaim joining an additional counter-defendant and moved for class certification. *Id.* The additional counter-defendant removed to federal court. *Id.* The original defendant moved to remand on the grounds that the additional counter-defendant was not a "defendant" pursuant to § 1441. *Id.* at 329-30. The district court granted the motion to remand, and we affirmed. *Id.* at 330, 337.

under § 1453(b). *Id.* at 334. First, it concluded that because an additional counter-defendant was not "the defendant or the defendants" under § 1441(a), it could not be "any defendant" under § 1453(b). *Id.* It reasoned that "any" did not change the meaning of "defendant," and that the inclusion of "any" at most allowed removal by a party that met the existing definition of "defendant." *Id.* at 335. Second (and relatedly), it examined the text of § 1453(b) and concluded that the two references to "any defendant" eliminated specific removal restrictions but did not expand the definition of "defendant." *Id.* at 335. According to the court, the phrase "without regard to whether *any defendant* is a citizen of the State in which the action is brought" merely eliminated the home-state defendant rule. *See id.* And the phrase "may be removed by *any defendant* without the consent of all defendants" merely eliminated the unanimity requirement. *See id.* In the context of construing § 1453(b) as well, *Palisades* observed that "this conclusion is consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *Id.* at 336.

Since this court's decision in *Palisades*, other courts have considered whether an additional counter-defendant can remove a class action counterclaim. *Palisades*'s conclusion that an additional counter-defendant cannot remove a class action has been adopted by at least two other circuits. *See Tri-State Water Treatment, Inc., v. Bauer*, 845 F.3d 350, 355-56 (7th Cir. 2017) (reaching the same conclusion and stating that "[t]he only two circuits that have squarely addressed this issue agree with us"); *Contreras*, 644 F.3d 799 (the other decision cited by *Tri-State*).

III.

Home Depot argues that it is entitled to remove Jackson's counterclaim for two reasons. It first argues that the Supreme Court has cast doubt on the assumptions that underpinned this court's decision in *Palisades*, and that we must therefore reconsider whether an additional counter-defendant is entitled to remove a class action counterclaim. In particular, Home Depot claims that the conclusion in *Palisades* that an additional counter-defendant is not "any defendant" with removal authority under § 1493(b) does not survive the Supreme Court's decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014). Home Depot argues that *Dart Cherokee* called into question the application of *Shamrock Oil*'s interpretation of "defendant" in the class action context.

Alternatively, Home Depot argues that even if *Palisades* survives *Dart Cherokee*, *Palisades* is inapplicable here because Citibank, the original plaintiff, is no longer a party in this case. Home Depot argues that it is a defendant in Jackson's counterclaim, the sole live action remaining, and thus is entitled to remove under § 1446(b). Because our analysis is constrained by the intricate timeline before us, we note again that on August 26, 2016, Jackson filed his counterclaim; on September 23, 2016, Citibank voluntarily dismissed its claims against Jackson without prejudice (but remained a counter-defendant in Jackson's counterclaim); on October 12, 2016, Home Depot filed its notice of removal; on October 28, 2016, Home Depot moved to realign the parties; on November 8, 2016, Jackson moved to remand; and on November 18, 2016, Jackson amended his counterclaim to drop his claims

against Citibank. Only at that point was Citibank no longer a party to this dispute.

Finally, Home Depot argues that the district court erred by failing to realign the parties. Home Depot apparently seeks to be captioned as a "defendant" in order to strengthen its argument that it is a defendant under the removal statutes.

For the reasons that follow, we disagree. We conclude that our decision in *Palisades* survives *Dart Cherokee* and is applicable here. We also affirm the district court's denial of Home Depot's motion to realign the parties. We address each argument in turn.

A.

Home Depot first argues that *Palisades* does not survive *Dart Cherokee* because the "Supreme Court's rejection of the anti-removal presumption in *Dart Cherokee* undermines *Palisades*'s reasoning" and calls into question the application of *Shamrock Oil* under CAFA because of the unique federalism interests present in class action cases. *See* Appellant's Br. at 22. We disagree. We hold that the Supreme Court has not called into question *Palisades*'s conclusion that an additional counter-defendant is not entitled to remove under § 1441(a) or § 1453(b), nor has it abandoned *Shamrock Oil*'s definition of "defendant" in the class action context.

In *Dart Cherokee*, the Supreme Court held that a defendant's notice of removal need only include a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. *Dart Cherokee*, 135 S. Ct. at 553-54. In so holding, the Supreme Court remarked that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to

facilitate adjudication of certain class actions in federal court." *Id.* at 554.

Home Depot argues that *Palisades*'s "application of the 'original defendant' rule was based, in substantial part, on a flawed premise that the 'anti-removal presumption' applies to CAFA." Appellant's Br. at 21. This characterization appears to be based on *Palisades*'s interpreting § 1453(b) "consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *See Palisades*, 552 F.3d at 336. But it is possible to construe removal strictly without applying an anti-removal presumption. The Seventh Circuit recently did precisely that in holding that § 1453(b) did not expand removal authority to an additional counter-defendant in a class action while explicitly noting the absence of an anti-removal presumption in the CAFA context. *Tri-State*, 845 F.3d at 356. Moreover, *Palisades* itself recognized that CAFA expanded removal authority, noting that "[t]hrough CAFA, Congress expanded federal diversity jurisdiction by amending 28 U.S.C. § 1332," and that "we are cognizant of the fact that Congress clearly wished to expand federal jurisdiction through CAFA." *See Palisades*, 552 F.3d at 331, 336. Accordingly, we conclude that the strict construction of the removal statute in *Palisades* did not reflect an anti-removal presumption.

Nor can we conclude that *Palisades* applied an anti-removal presumption by utilizing *Shamrock Oil*'s definition of "defendant" in the class action context. The analytical focus of *Palisades* was on interpreting the word "defendant" in § 1441(a) and § 1453(b) to have the same meaning in both provisions. Since the definition of the term "the defendant or the

defendants" in § 1441(a) was well-established and the provision was not amended by CAFA, we concluded that § 1453(b)'s two references to "any defendant" did not change the meaning of § 1441(a) or extend a right of removal under § 1453(b) to additional parties. To give the term "defendant" in these interlocking removal statutes different meanings would render the provisions "incoherent." *See First Bank v. DJL Props., LLC*, 598 F.3d 915, 917 (7th Cir. 2010). When Congress uses a term with a well-established meaning, we presume—absent evidence otherwise—that Congress intends to adopt that meaning, because Congress is presumed to be aware of judicial interpretations. *See id.*

As the Seventh Circuit noted in rejecting an argument identical to that presented here, "there is not a whisper in *Dart Cherokee* of any move to overrule *Shamrock Oil*. If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move." *Tri-State*, 845 F.3d at 356. We agree. If the Supreme Court believes that CAFA expanded the meaning of "defendant," it will say so directly. We decline to upend so settled a definition as "defendant" without clear direction from the Supreme Court. We therefore hold that *Dart Cherokee* did not undermine *Palisades*'s interpretation of § 1441(a) and § 1453(b).

B.

Alternatively, Home Depot seeks to distinguish *Palisades* on the grounds that it is a defendant—not a counter-defendant or a third-party defendant—in the only live dispute in this case. As such, it contends that it is entitled to remove because § 1446(b)(2)(B) allows each defendant "30 days after receipt by or service on

that defendant of the initial pleading or summons . . . to file the notice of removal." But at the time Home Depot filed for removal, Citibank—the original plaintiff—remained a counter-defendant. We therefore hold that Home Depot cannot avoid *Palisades* merely because Citibank had dismissed its claims against Jackson.

In reaching this conclusion, we pay particular attention to the complex timeline of events in this case. While Citibank is no longer a party to this dispute, it remained a counter-defendant when Home Depot filed its notice of removal, which is when we evaluate removability. *See Francis v. Allstate Ins. Co.*, 709 F.3d 362, 367 (4th Cir. 2013). When Home Depot filed its notice of removal on October 12, 2016, Jackson's counterclaim still asserted claims against Citibank. Indeed, Jackson still asserted claims against Citibank when he filed his motion to remand on November 8, 2016. Because Citibank remained a counter-defendant when Home Depot filed its notice of removal, we cannot give weight to the fact that Jackson later dropped his claims against Citibank. The only relevant distinction between this case and *Palisades* is that here the original complaint had been voluntarily dismissed without prejudice when Home Depot filed its notice of removal.

Against this backdrop, we hold that Home Depot is not entitled to remove Jackson's counterclaim. First, this result is most consistent with our precedent governing removal under § 1441(a) and § 1453(b). We have consistently allowed removal only by parties against whom the original plaintiff asserts claims and have never conditioned this rule upon the viability of the original complaint. *See Palisades*, 552 F.3d at 333.

As we stated previously, we pay close attention to the fact that at the time Home Depot filed its notice of removal, Citibank remained a counter-defendant in this case even though it had voluntarily dismissed without prejudice its claim against Jackson. We need not decide how § 1441(a) and § 1453(b) would apply if, at the time Home Depot filed its notice of removal, Jackson had dropped his counterclaim against Citibank.

Second, allowing Home Depot to remove would give the original plaintiff—who in North Carolina has broad power to voluntarily dismiss its complaint, *see* N.C. Gen. Stat. § 1A-1 Rule 41(a)—the power to decide whether a counterclaim against it is adjudicated in federal court. Citibank's voluntary dismissal of its complaint cannot make an existing counterclaim against Citibank and others removable. If it did, Citibank would have de facto removal authority in contravention of the rule that an original plaintiff cannot remove a counterclaim against it.

Third, allowing Home Depot to remove would invite gamesmanship. When Jackson filed his counterclaim, Home Depot could not remove because it was not a party against whom Citibank initially brought a claim. *See Palisades*, 552 F.3d at 333. If Home Depot could now remove Jackson's counterclaim, an original plaintiff counter-defendant could voluntarily dismiss its complaint without prejudice in order to disrupt unfavorable proceedings in state court, and, given CAFA's expanded removal authority, an additional counter-defendant could then remove the counterclaim to federal court. The original plaintiff might later attempt to reinstate its state court action, creating parallel proceedings in state court.

At the time Home Depot filed its notice of removal, the original plaintiff remained a party in the counterclaim Home Depot tried to remove. Allowing Home Depot to remove the counterclaim against Home Depot, Citibank, and CWS would be inconsistent with our prior interpretations of CAFA's removal statute. Accordingly, we conclude that Home Depot cannot escape the holding of *Palisades*.

C.

In an attempt to bolster its argument that it is a defendant entitled to file a notice of removal under § 1446(b)(2)(B), Home Depot appeals the district court's denial of its motion to realign the parties. Because this case does not involve an attempt to artificially manufacture diversity jurisdiction, we affirm the district court's denial of Home Depot's motion to realign.

Judicial realignment of the parties prevents the creation of sham diversity jurisdiction. *Faysound Ltd. v. United Coconut Chems. Inc.*, 878 F.2d 290, 295 (9th Cir. 1989). "Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who are defendants. It is [the Supreme Court's] duty, as it is that of the lower federal courts, to look beyond the pleadings and arrange the parties according to their sides in the dispute." *Indianapolis v. Chase Nat'l Bank of City of N.Y.*, 314 U.S. 63, 69 (1941). In determining whether to realign the parties, this court employs the "principal purpose" test, in which we determine the primary issue in controversy and then align the parties according to their positions with respect to that issue. *U.S. Fidelity & Guar. Co. v. A&S Mfg. Co., Inc.*, 48 F.3d 131, 133 (4th Cir. 1995).

In its rush to claim applicability of the principal purpose test, Home Depot ignores the reason realignment exists at all. Realignment ensures that parties do not artfully draft pleadings in order to escape "the mandate that courts carefully confine their diversity jurisdiction to the precise limits that the jurisdictional statute, pursuant to Article III, has defined." *See id.* Because no party contends that this case involves an attempt to fraudulently manufacture diversity jurisdiction, we need not delve too deeply into the issue of realignment. In the absence of a compelling reason to apply principles of realignment outside their traditional domain, we affirm the district court's denial of Home Depot's motion to realign the parties.

IV.

For the foregoing reasons, the district court properly declined to realign the parties and correctly remanded this case to state court. Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL ACTION NO. 3:16-CV-00712-GCM

CITITBANK, N.A., Plaintiff,

v.

GEORGE W. JACKSON, Defendant.

GEORGE W. JACKSON, Counter-Plaintiff
and Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC., CAROLINA WATER
SYSTEMS, INC., Third-Party Defendants.

ORDER

THIS MATTER is before the Court on Third-Party Defendant Home Depot's Motion to Realign the Parties (Doc. No. 14), Defendant, Counter-Plaintiff, and Third-Party Plaintiff George W. Jackson's Motion to Remand (Doc. No. 23), Jackson's Memorandum in Opposition to Motion to Realign the Parties (Doc. No. 27), Home Depot's Response to Motion to Remand (Doc. No. 35), Home Depot's Reply to Response to Motion to Realign the Parties (Doc. No. 37), and Jackson's Reply to Reponses to Motion to Remand (Doc. No. 38).

1) Background

Jackson was sued by Plaintiff and Counterclaim Defendant Citibank NA ("Citibank") to collect an allegedly outstanding debt for a water filtration system purchased by Jackson from Home Depot and Counterclaim Defendant Carolina Water Systems ("CWS"). Jackson timely answered and asserted a Third Party class action complaint on August 26, 2016, alleging that Home Depot and CWS had a scheme of misleading customers about the alleged dangerousness of their water and subsequently selling them unnecessary water filtration systems. Jackson claims this scheme is an unfair and deceptive trade practice. Further, Jackson alleges Home Depot's and CWS's advertising and solicitation of water treatment system, offering free products and/or compensation to potential customers who agree to refer other purchasing customers, is a violation of North Carolina's Referral Sales Statute. G.S. § 25A-37. Citibank voluntarily dismissed its lawsuit without prejudice against Jackson on September, 23 2016.

Counter-Plaintiff Jackson asserts claims on behalf of himself and "[a]ll persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for 'water treatment' equipment." Complaint, ¶ 46. Further, Counter-Plaintiff Jackson asserts claims on behalf of himself and "[a]ll persons in the state of North Carolina that purchased a Water Treatment System from Carolina Water Systems, Inc., during the Class Period." *Id.*

On October 28, 2016 Third-Party Defendant Home Depot filed a Motion to Realign the Parties. On November 8, 2016 Counter-Plaintiff Jackson filed a Motion to Remand. The analysis for these motions

affect each other and so the Court's analysis handles both motions.

2) Standard of Review

28 U.S.C.A. § 1441, the general removal statute, provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." § 1441(a).

CAFA expanded federal diversity jurisdiction by conferring original federal jurisdiction over class actions in which "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—(A) any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C.A. § 1332(d)(2).

Plus Congress added 28 U.S.C.A. § 1453(b), which says:

> A class action may be removed to a district court of the United States in accordance with [28 U.S.C. §] 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

"We begin with the undergirding principle that federal courts, unlike most state courts, are courts of limited jurisdiction, created by Congress with specified jurisdictional requirements and limitations.

Accordingly, a party seeking to adjudicate a matter in federal court must allege and, when challenged, must demonstrate the federal court's jurisdiction over the matter." *Strawn v. AT & T Mobility*, 530 F.3d 293, 296 (4th Cir. 2008) (citations omitted).

3) Analysis

A.

The analysis of whether third-party defendant Home Depot is allowed to remove a case to federal court is straight forward. There is clear Fourth Circuit precedent on this issue that says only the original defendant in a case is granted the power to remove. Home Depot argues that this precedent should no longer be followed. This Court disagrees as is explained below.

The Fourth Circuit has held that "an additional counter defendant is not a 'defendant' for purposes of § 1441(a)." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008). This holding is consistent with the Supreme Court case *Shamrock Oil & Gas Corp v. Sheets*, 61 S. Ct. 868 (1941) which courts have applied to "consistently refuse[] to grant removal power under § 1441(a) to third-party defendants—parties who are not the original plaintiffs but who would be able to exercise removal power under ATTM's interpretation." *Palisades*, 552 F.3d at 332.

Home Depot argues that the *Palisades* precedent that third-party defendants are not permitted to remove cases to federal court under § 1453(b) has since been overruled by the Supreme Court in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014).

Interestingly, in a nearly identical case the Seventh Circuit Court of Appeals rejected the same argument made by Home Depot in its court. *Tri-State Water Treatment, Inc. v. Bauer v. Home Depot U.S.A., Inc.*, 845 F.3d 350 (7th Cir. Jan. 5, 2017). In *Bauer*, Tri-State Water Treatment brought a collection action against the Bauers for failing to pay for a water treatment system that Tri-State installed after doing a free, in-home assessment of the water in the Bauers' house. *Id.* at 352. The Bauers responded by filing a class-action counterclaim against Aquion, Inc. and Home Depot. *Id.* Home Depot timely filed a notice of removal. The similarities of the *Bauer* case to the current case before the Court are apparent. The district court in *Bauer* found that CAFA did not expand the parties entitled to removal beyond the original defendants and Home Depot appealed. *Id.*[1]

While decisions from other circuits are not precedential, they can be highly persuasive in the Court's analysis of a legal issue. *See, eg. Stuckey v. Colvin*, 2013 WL 6185837 (E.D. Va. Nov. 24, 2013); *Morrison v. Astrue*, 2011 WL 1303651 (W.D.N.C. Mar. 31 2011).

The Seventh Circuit's reaction in *Bauer* when Home Depot made the argument that *Dart Cherokee* has changed the analysis of the interpretation of which defendants have the power to remove is identical to this Court's reaction:

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[1] The Seventh Circuit found the Fourth Circuit case *Palisades* to be "directly on point, as it rejected an additional counter-claim-defendant's argument for removal under § 1453(b). The Fourth Circuit reasoned that the word 'any' did not change the well-established meaning of 'defendant.'" *Bauer*, 845 F.3d at 356 (citation omitted).

> This is slightly surprising because *Dart Cherokee* does not address the issue before us . . . there is not a whisper in *Dart Cherokee* of any move to overrule *Shamrock Oil*. If that is where the Supreme Court is going, it will have to get there on its own; it is not for us to anticipate such a move.

Bauer at 356.

The Court finds that *Dart Cherokee* did not overrule the holdings of *Shamrock Oil* and *Palisades* and therefore Home Depot, being not an original defendant, did not have the right to remove this case to federal court.

B.

In addition, Home Depot argues that the Court should first realign the parties making Home Depot the defendant in this case before reaching the question of remand. (Doc No. 36 at 7-8). It is argued that Jackson should be realigned as the Plaintiff and Home Depot and Carolina Water Systems should be realigned as the Defendants. Under this alignment, the removing party would arguable be a "defendant" for the purposes of the removal statute.

Federal courts have a "duty to look beyond the pleadings, and arrange the parties according to their sides in the dispute." *City of Indianapolis v. Chase Nat. Bank of City of N.Y.*, 314 U.S. 63, 69, 62 S. Ct. 15, 17 (1941) (internal quotation marks omitted). "The Fourth Circuit has adopted the two-step principal purpose test to assess the proper alignment of parties." *Wayne J. Griffin Elec., Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 842983 (M.D.N.C. Mar. 4, 2014) (citing *Palisades*, 552 F.3d at 337). "Application of the

principal purpose test entails two steps. First, the court must determine the primary issue in the controversy. Next, the court should align the parties according to their positions with respect to the primary issue." *U.S. Fid. & Guar. Co. v. A & S Mfg. Co.*, 48 F.3d 131, 133 (4th Cir. 1995).

In this case the "principle purpose" for Citibank to file this suit was to collect Jackson's debt. On that issue, the parties were properly aligned. *See e.g. Arrow Financial Services, LLC v. Williams*, 2011 WL 9158435, at *4 (W.D. Mo. Jan, 20, 2011); *Palisades*, 552 F.3d at 337.

This is not a situation where there are antagonistic parties on the same side. Even if the parties were not properly aligned, a second consideration would weigh significantly against realignment. Prior to removal, Citibank dismissed its claim against Jackson *without prejudice*. In similar circumstances, courts have found that allowing realignment only to create federal jurisdiction would promote forum shopping. *See Chancellor's Leaning Sys., Inc. v. McCutchen*, 2008 WL 269535, at *3 (N.D. Ohio Jan 29, 2008) (explaining "[plaintiff] brought a breach of contact action in state court . . . [defendant] answered and filed a counterclaim asserting a claim under a federal statute. Thereafter, [plaintiff] ma[de] a strategic decision to dismiss its complaint without prejudice and remove the action . . . [that] claim has not been adjudicated and by dismissing without prejudice, [plaintiff] may intend to reassert the claim as a counterclaim [or setoff] in federal court if removal is permitted . . . the Court . . . will not re-align the parties to enable [plaintiff] to forum shop."); *see also*, *Arrow*, 2011 WL 9158435 at *4;

General Credit Accceptance, Co. LLC v. Deaver, 2013 WL 2420392 (E.D. Mo. June 3, 2013).

Since the parties are properly aligned according to the principal purpose test and realignment would only serve the purpose of forum shopping, the Court refuses to realign the parties.

4) Conclusion

For all the reasons set for forth above, it is hereby

ORDERED that Jackson's Motion to Remand (Doc. No. 23) is **GRANTED**; it is further

ORDERED that Home Depot's Motion to Realign the Parties (Doc. No. 14) is **DENIED**; it is further

ORDERED that all other pending motions are **DISMISSED WITHOUT PREJUDICE**, subject to refiling in the Superior Court of Mecklenburg County; it is further

ORDERED that this case is remanded to the Superior Court of Mecklenburg County.

SO ORDERED.

Signed: March 21, 2017

s/
Graham C. Mullen
United States District Judge

No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June 2018

QUESTION PRESENTED

Whether the removal provision of the Class Action Fairness Act, 28 U.S.C. § 1453, allows a party that is not a defendant as this Court construed that term in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), to remove class counterclaims asserted by the defendant in a state-court action.

PARTIES TO THE PROCEEDING

The petition's statement of parties (Pet. ii) correctly identifies the entities that were parties to the proceedings below and are parties in this Court. Its characterization of petitioner Home Depot, U.S.A., Inc., and Carolina Water Systems, Inc., as "original defendant[s]," however, reflects Home Depot's position on the substantive issue raised in the petition, which respondent George W. Jackson contests. In the proceedings below, all parties (including Home Depot) as well as the court of appeals and district court, referred to Home Depot as a "third-party defendant" or "additional counter-defendant." *See* Pet. App. 1a, 5a. Mr. Jackson was referred to as defendant, counter-plaintiff, and third-party plaintiff.

Home Depot's statement of parties also inaccurately states that Mr. Jackson's putative class action was "brought as a counterclaim in the district court," which in context appears to refer to the federal district court. Pet. ii. Home Depot was indisputably made a party to Civil Action No. 16 CVD 10961, Citibank's collection action filed in the North Carolina General Court of Justice, District Court Division, Mecklenburg County, by way of Mr. Jackson's Answer, Affirmative Defenses, Counterclaim, and Third-Party Class Action Claims filed on August 26, 2016. Mr. Jackson's class action was filed as a counterclaim in state court, not the federal district court.

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INTRODUCTION

In *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), this Court held that a state-court plaintiff against whom the defendant has asserted a counterclaim is not a "defendant" entitled to remove the action to federal court under the predecessor to 28 U.S.C. § 1441, which provides for removal by "the defendant or the defendants." In the decades that followed, the lower federal courts broadly agreed that, under the reasoning of *Shamrock Oil*, third-party defendants and additional counter-defendants are likewise not defendants entitled to remove under § 1441.

When Congress enacted the Class Action Fairness Act (CAFA) in 2005, it altered many principles applicable to diversity and removal jurisdiction over class actions, but it left intact the rule that only a defendant can remove a case based on diversity. *See* 28 U.S.C. § 1453(b). As a result, beginning two years after CAFA's enactment and continuing to the present, all the courts of appeals that have considered the question—the Fourth, Sixth, Seventh, and Ninth Circuits—have held that CAFA incorporates the principles developed in *Shamrock Oil* and its progeny, and that a state-court counter-defendant thus may not remove an action under CAFA.

Given the absence of circuit conflict on this question of statutory construction, this Court has denied certiorari on the issue three times, most recently last year when Home Depot—the same petitioner as in this case—raised it in another case. *See Home Depot U.S.A., Inc. v. Bauer*, 137 S. Ct. 2138 (2017) (denying review of *Tri-State Water Treatment, Inc., v. Bauer*, 845 F.3d 350 (7th Cir. 2017)). In its current petition, Home Depot once again asserts that the circuits have

created a "loophole" in CAFA, *see* Pet. 2, *Bauer* Pet. 1, but it points to no reason that the issue merits review now any more than last year. The only development since then is that the Fourth Circuit has reaffirmed its decade-old holding in *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008), *cert. denied*, 557 U.S. 919 (2009)—this time with the agreement of Judge Niemeyer, the only circuit judge among the over twenty who have considered the issue who has ever dissented from applying the established meaning of "defendant" to CAFA. *Compare* Pet. App. 2a (joining opinion), *with Palisades*, 552 F.3d at 337 (dissenting).

Review of this narrow question of statutory construction, on which the courts of appeals are in complete agreement, remains unwarranted. Home Depot's argument for review is based on its view that the circuit consensus is wrong, but such arguments rarely provide sufficient justification for this Court to devote its resources to considering an issue. *See* S. Ct. R. 10. Here, the argument is particularly unpersuasive because the lower courts' consensus neither "depart[s] from the accepted and usual course of judicial proceedings" nor "conflicts with relevant decisions of this Court." *Id.* Far from it: The courts of appeals have correctly construed CAFA.

Home Depot's assertion that the courts' construction has "provided a roadmap for circumventing the clear purpose of the Act," Pet. 22, is exaggerated and unconvincing. Regardless, those who share the belief of Home Depot and its amici that the statute's terms contain a "loophole" that undermines its purposes should take their complaint to Congress. That Congress has done nothing in the years since the judicial consensus on this issue emerged underscores that

Home Depot's assertion that the courts of appeals have flouted congressional intent is incorrect.

STATEMENT

1. In enacting CAFA, Congress addressed a number of limitations on federal original and removal jurisdiction over class actions based on diversity of citizenship. As this Court explained in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161 (2014), "CAFA expanded diversity jurisdiction [for class actions] in two key ways": it replaced the "ordinary requirement of complete diversity of citizenship among all plaintiffs and defendants ... with a requirement of minimal diversity" between any defendant and any class member, and it replaced the requirement that "each plaintiff's claim ... exceed" the amount-in-controversy threshold with a grant of jurisdiction over class actions "in which the *aggregate* amount in controversy exceeds $5 million." *Id.* at 165 (emphasis added); *see* 28 U.S.C. § 1332(d). CAFA's creation of original federal jurisdiction over diversity class actions, however, was not unlimited: In addition to the $5 million amount-in-controversy requirement, CAFA requires that a class action must involve at least 100 class members, and it provides for federal courts to decline jurisdiction over certain claims involving local controversies, home-state defendants, governmental defendants, and securities or corporate government matters. *See* 28 U.S.C. §§ 1332(d)(2), (3), (4), (5), & (9).

CAFA also expanded the availability of removal for state-court class actions that fall within its grant of original federal jurisdiction. Specifically, the statute eliminated three limitations normally applicable when defendants seek to remove a diversity case: the prohibition on removal by a defendant sued in its

home state, the requirement that all defendants must consent to or join in a removal petition, and the bar on removal more than one year after an action is first filed. *See* 28 U.S.C. § 1453(b). In addition, CAFA created a procedure for permissive appeals of orders remanding class actions to state courts on jurisdictional grounds, which would otherwise be barred by 28 U.S.C. § 1447(d). *See* 28 U.S.C. § 1453(c); *see also Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 552 (2014).

One respect in which CAFA does *not* depart from prior jurisdictional and removal statutes is that it provides for removal only by a "defendant," 28 U.S.C. § 1453(b), and it incorporates the pre-existing removal-procedure statute, 28 U.S.C. § 1446, which provides that removal requires a petition filed by a "defendant or defendants." *Id.* § 1446(a).

As a result, soon after CAFA's passage, the Ninth Circuit concluded in *Progressive West Insurance Co. v. Preciado*, 479 F.3d 1014 (9th Cir. 2007), that, in enacting CAFA, Congress incorporated into the statute the same limit on removal that courts had imposed on existing removal statutes based on the holding of *Shamrock Oil*: A plaintiff named in a counterclaim "is not a defendant for purposes of the federal removal statutes and therefore cannot remove an action to federal court." *Id.* at 1017. "CAFA," the court stated, "does not create an exception to *Shamrock*'s longstanding rule." *Id.*

A year later, the Fourth Circuit in *Palisades* held that CAFA likewise precludes removal by an "additional counter-defendant"—*i.e.*, a counter-defendant other than the original plaintiff. The court pointed out that in the decades following *Shamrock Oil*, federal

courts applying its teaching had "refused to grant removal power under § 1441(a) to third-party defendants." 552 F.3d at 332. The court further noted that "additional counter-defendants, like third-party defendants, are certainly not defendants against whom the original plaintiff asserts claims," and thus such a party "is not a 'defendant' for purposes of § 1441(a)" under *Shamrock Oil* as applied by the courts prior to CAFA. *Id.* at 333. Because CAFA likewise refers to a "defendant" as the "party who may remove" and provides for removal in accordance with § 1446, which also uses the term "defendant or defendants," *Palisades* concluded that "Congress clearly did not intend to extend the right of removal to parties other than 'defendant[s]'" when it enacted CAFA. *Id.* at 334.

The Fourth Circuit further rejected the argument that CAFA's use of the words "any defendant" in the phrase "such action may be removed by any defendant without the consent of all defendants," 28 U.S.C. § 1453(b), expanded the universe of "defendants" entitled to remove. The court reasoned that "the use of the word 'any' cannot change the meaning of the word 'defendant,'" and that the word, read in context, was intended to "eliminate[] the judicially-recognized rule of unanimous consent to removal." *Id.* at 335. As the court explained, "the use of the word 'any' juxtaposed with the word 'all' was intended to convey the idea of non-unanimity, not to alter the definition of the word 'defendant.'" *Id.* at 335–36. The court thus concluded:

> Put simply, there is no indication in the language of § 1453(b) (or in the limited legislative history) that Congress intended to alter the traditional rule that only an original defendant may remove and to somehow transform an additional counter-defendant ... into a "defendant" with the power to

> remove. Reading § 1453(b) to also allow removal by counter-defendants, cross-claim defendants, and third-party defendants is simply more than the language of § 1453(b) can bear.

Id. at 336. This Court denied certiorari. 557 U.S. 919 (2009).

Following the Fourth Circuit's decision in *Palisades*, the Sixth, Seventh, and Ninth Circuits agreed with its holding. *See Tri-State Water*, 845 F.3d at 356; *In re Mtge. Elec. Registration Sys., Inc.*, 680 F.3d 849, 854 (6th Cir. 2012) (*"MERS"*); *Westwood Apex v. Contreras*, 644 F.3d 799, 806 (9th Cir. 2011); *First Bank v. DJL Props., LLC*,598 F.3d 915, 916–17 (7th Cir. 2010); *In re Morgan & Pottinger, P.S.C.*, 2010 WL 9476582, at *1 (6th Cir. 2010). This Court denied certiorari in *First Bank*, 562 U.S. 1003 (2010), and, last year, in *Tri-State Water*, 137 S. Ct. 2138.

2. This case began when Home Depot, Carolina Water Systems, Inc. (CWS), and Citibank acted in concert to sell respondent George Jackson an unnecessary water treatment system and to provide financing for that transaction. In so doing, they employed unfair and deceptive practices, including an unlawful referral scheme that violates North Carolina's Referral Sales Statute, N.C. Gen. Stat. § 25A-37, and a deceptive and misleading sales presentation designed to scare Mr. Jackson into believing that his water was contaminated and unsafe.[1]

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[1] Because the case was removed at the pleading stage, the description of the alleged unlawful conduct is based on the allegations in Mr. Jackson's counterclaim, which are set forth in the Fourth Circuit Joint Appendix at A-26–A-45.

The scheme worked as follows: Representatives of Home Depot and CWS would perform in-home sales presentations that included pitching the unlawful referral scheme, benign water tests that the representatives alleged demonstrated water contamination, and other deceptive and misleading sales tactics. These unfair and deceptive practices induced Mr. Jackson and other members of the putative class in this case to enter into sales contracts with CWS for the purchase of water treatment systems. Home Depot then provided the systems and installed them pursuant to a "home improvement agreement." Home Depot also arranged for financing of the systems by offering purchasers a Home Depot branded credit card, issued by Citibank. Citibank then serviced the credit card debt. The interest rate on the credit card was 25.99% after the first year.

Citibank sued Mr. Jackson in a North Carolina state court alleging that he had failed to pay for the water-treatment system he had purchased from Home Depot and CWS using a Home Depot credit card issued by Citibank. Mr. Jackson answered and asserted a counterclaim against Citibank as well as third-party class action claims against additional counter-defendants Home Depot and CWS. The counterclaim alleged that Home Depot and CWS had engaged in unfair and deceptive trade practices by misleading consumers about the water-treatment systems and that Citibank was liable as an assignee of their claims for payment. The putative class consists of approximately 286 members who purchased water systems from CWS and Home Depot in North Carolina, 259 of whom had North Carolina home addresses.

Home Depot's petition wrongly asserts that Home Depot "was not a party to that [state-court] action, and

never became a party to that collection dispute." Pet. i. In fact, it is undisputed that Mr. Jackson's claims against Home Depot and CWS, as well as his counter-claim against Citibank, were all filed in state court on August 26, 2016, making all three entities parties to the state-court action.

Shortly after Citibank voluntarily dismissed its state-court claims without prejudice, Home Depot removed the case under CAFA to the U.S. District Court for the Western District of North Carolina. Following the binding circuit precedent of *Palisades*, the district court remanded the case to the state court. Pet. App. 16a. As a result of that ruling, the district court did not reach two alternative grounds for remand argued by Mr. Jackson:

(1) that Home Depot had failed to show that the amount in controversy exceeded CAFA's jurisdictional threshold of $5 million, given that there were only 286 class members and the lead plaintiff, Mr. Jackson, claimed to have suffered damages of little more than $1000; and

(2) that the case was subject to mandatory remand under CAFA's "local controversy" exception, 28 U.S.C. § 1332(d)(4)(A), because at least two thirds of the members of the class and CWS, a counter-defendant from whom significant relief was sought and whose conduct formed a significant basis of the claims, were citizens of North Carolina, the principal injuries alleged occurred in North Carolina, and there had been no similar class action filed against Home Depot, Citibank and CWS on behalf of the class

members within the previous three-year period.

The Fourth Circuit granted Home Depot permission to appeal and, in a unanimous opinion—joined in full by Judge Niemeyer, who had *dissented* in *Palisades*—affirmed. The court began by explaining that its decision in *Palisades* had already determined that CAFA's use of the term "defendant" to describe the parties entitled to remove incorporated the settled meaning of that term under other removal statutes and precluded removal of a class action counterclaim by an additional counter-defendant. Pet. App. 4a–7a. The court further noted that subsequent to *Palisades*, the Seventh and Ninth Circuits had followed its holding as to additional counter-defendants. Pet. App. 7a.

The court then addressed, and rejected, Home Depot's argument that this Court's decision in *Dart Cherokee* effectively overruled *Palisades* by holding that there is no "antiremoval presumption" under CAFA. 135 S. Ct. at 554. The court concluded that *Palisades* did not rest on any such presumption. Rather, the court explained, *Palisades* recognized that "Congress clearly wished to expand federal jurisdiction through CAFA." Pet. App. 10a (quoting *Palisades*, 552 F3d. at 336). *Palisades* nonetheless concluded that in using the term "defendant" to describe the parties entitled to remove a class action, CAFA adopted the "well-established meaning" of that term, which excluded removal by parties facing counterclaims. Pet. App. 11a. That conclusion did not rest on an "antiremoval presumption," but on the presumption that Congress is "aware of judicial interpretations" and "intends to adopt" the meanings they have given to statutory terms when it uses the same terms in later enactments. *Id.* Failure to apply that presumption here, the

court stated, would "give the term 'defendant' in the[] interlocking removal statutes different meanings" and thus "render the provisions 'incoherent.'" *Id.* (citation omitted).

The court also rejected the argument—not advanced by Home Depot in its petition for certiorari—that *Palisades* was distinguishable because the original plaintiff had dropped its claims before Home Depot removed, turning Home Depot from a counter-defendant into a defendant. Considering the "complex timeline of events in this case," Pet. App. 12a, the court pointed out that at the time of removal Citibank remained a counter-defendant, as Mr. Jackson had not dropped his claims against it, and hence Home Depot was thus still an additional counter-defendant. The court further noted that allowing removal in such circumstances would invite gamesmanship—and allow the original plaintiff de facto removal authority—by giving the original plaintiff the power to determine whether an additional counter-defendant could remove. Pet. App. 13a.

Finally, the court of appeals held that the district court had not erred in declining Home Depot's request to realign the parties, with Mr. Jackson as plaintiff and Home Depot as defendant. The court noted that realignment doctrine was created to prevent parties from "fraudulently manufactur[ing] diversity jurisdiction," Pet. 15a, by situating parties who would otherwise destroy diversity on the wrong side of the "v." Noting that this case did not involve any such sham attempt to create diversity jurisdiction, the court declined to apply realignment principles "outside their traditional domain." Pet. 15a. As with the court's holding on Citibank's dismissal of its claims, Home Depot

does not seek review of the court's realignment holding or claim that it presents an issue meriting review.

REASONS FOR DENYING THE WRIT

I. Review of an issue on which the circuits are in agreement is unwarranted.

Whether CAFA incorporates the *Shamrock Oil* principle that removal is limited to "defendants"—and hence does not extend to "counterclaim defendants," "third party defendants," or "additional counter-defendants"—has been the subject of only eight federal appellate decisions in four circuits in the thirteen years since CAFA's enactment. Although the issue has not arisen with great frequency, the rulings addressing it have been remarkable in their consistency. Each has held that "defendant" in CAFA means the same thing as in the statute at issue in *Shamrock Oil* and its direct descendant, 28 U.S.C. § 1441. *See* Pet. App. 9a, *Tri-State Water*, 845 F.3d at 354–57; *MERS*, 680 F.3d at 853–54; *Westwood*, 644 F.3d at 804–07; *First Bank*, 598 F.3d at 917; *Morgan & Pottinger*, 2010 WL 9476582, at *1; *Palisades*, 552 F.3d at 332–36; *Progressive*, 479 F.3d at 1017–18.

No less notable than the circuits' unanimity in holding that neither original plaintiffs nor third parties named as counter-defendants may remove under CAFA is the diverse range of judges who have written and joined in those decisions, which collectively generated only one dissenting opinion. The authors of the courts' published opinions include Judge Sandra Ikuta in *Progressive West*; then-Chief Judge Karen Williams in *Palisades*; then-Chief Judge Frank Easterbrook in *First Bank*; Judge Milan Smith in *Westwood*; Judge Boyce Martin in *In re MERS*; Chief

Judge Diane Wood in *Tri-State Water*; and Judge Allyson Duncan in the decision below. Even judges who have had reservations about the *policy* of not allowing removal in such circumstances have acknowledged that Congress incorporated that "established legal principle" into CAFA. *Westwood*, 644 F.3d at 808 (Bybee, J., concurring).

Although only two of the decisions on the subject postdate this Court's opinion in *Dart Cherokee*, the opinions in those two agree that nothing in *Dart Cherokee* calls into question the courts' conclusion that Congress did not displace the *Shamrock Oil* principle when it enacted CAFA. *See* Pet. App. 9a–11a; *Tri-State Water*, 845 F.3d at 356. As *Tri-State Water* explains, *Dart Cherokee* "does not address the issue," and *Dart Cherokee*'s statement "that there is 'no anti-removal presumption ... [in] cases invoking CAFA'" has no bearing because the holding that Congress incorporated the *Shamrock Oil* principle into CAFA does not reflect "such an anti-removal presumption." 845 F.3d at 356 (quoting *Dart Cherokee*, 135 S. Ct. at 534).

The court below took exactly the same view, *see* Pet. App. 10a–11a. Indeed, Judge Niemeyer, whose dissent in *Palisades* formerly had been the lone expression of disagreement by any federal appellate judge with the proposition that CAFA incorporates the limits on removal derived from *Shamrock Oil*, this time joined without reservation in the panel's explanation that "*Dart Cherokee* did not undermine *Palisades*' interpretation of § 1441(a) and § 1453(b)" and that it would be "incoherent" to "give the term 'defendant' in these interlocking removal statutes different meanings." Pet. App. 11a.

Home Depot recognizes that those courts of appeals that have had occasion to address the issue were in complete agreement before *Dart Cherokee* and remain so after *Dart Cherokee*. Hoping to make lemonade from lemons, Home Depot attempts to transform the agreement among the circuits from a reason for denying review into a reason for granting it. Home Depot asserts that the "problem" it thinks is posed by the lower courts' agreement will not "ripen into ... a circuit split because the courts of appeals view their erroneous interpretation of CAFA as compelled by this Court's broad language in *Shamrock Oil*," and "[o]nly this Court can clarify the scope of its holding in *Shamrock Oil*." Pet. 25.

These assertions fundamentally misunderstand the basis of the lower courts' decisions. None of the courts addressing the issue stated that the result is "compelled" by *Shamrock Oil* itself. Rather, acknowledging that the Court in *Shamrock Oil* was not "speaking one way or the other to the situation that confronts us here," *Tri-State Water*, 845 F.3d at 354, the courts uniformly based their holdings on their construction of CAFA—that is, their conclusion that it is "CAFA's use of 'time-tested legal language'" that "requires us to adhere to the *Shamrock Oil* rule," *id.* (quoting *First Bank*, 598 F.3d at 917), not the *stare decisis* effect of *Shamrock Oil* in its own right.[2]

Of course, if the issue were whether *Shamrock Oil* should be *overruled*, there would be no doubt that only

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[2] *See also* Pet App. 10a–11a; *MERS*, 680 F.3d at 85; *Westwood*, 644 F.3d at 805–07; *id.* at 808–09 (Bybee, J., dissenting); *First Bank*, 598 F.3d at 917; *Palisades*, 552 F.3d at 336; *Progressive*, 479 F.3d at 1018.

this Court could do so. But Home Depot does not contend that its position requires overruling *Shamrock Oil*. Neither its question presented nor the body of its petition asks the Court to do so, even as an alternative ground of decision. Given that overruling *Shamrock Oil* is not on the table, Home Depot's argument falls flat, because nothing would bar lower courts from disagreeing about the "scope" of this Court's holdings if there were a basis for doing so. Here, however, the courts have found no basis for disagreement.

In any event, the issue is not really the "scope" of *Shamrock Oil*'s holding. Home Depot does not ask this Court to decide that the lower courts have misapplied *Shamrock Oil* in traditional removal cases under 28 U.S.C. § 1441 or claim that there is any disagreement about its scope in that context. Indeed, Home Depot explicitly disavows any intent to raise an issue about the correctness of the judicial consensus that *Shamrock Oil* precludes removal by third-party counter-defendants under § 1441. Pet. 13. The only question is whether Congress adopted or altered what Home Depot concedes was the settled construction of § 1441 developed in the wake of *Shamrock Oil* when it used the word "defendant" to define who could remove class actions under CAFA. That is an issue of congressional intent, not of the scope of *Shamrock Oil*'s holding. If the courts of appeals were persuaded that Home Depot and other proponents of extending removal to parties other than defendants offered the better interpretation of CAFA, *Shamrock Oil* would not itself disable them from accepting it.

Granted, a circuit split is *unlikely* to develop because, so far, the courts uniformly have found the argument for Home Depot's construction unpersuasive and are likely to continue to do so. Such agreement is

hardly a reason for this Court to grant review. Unless and until a conflict among the circuits develops as a result of a ruling from one of the eight federal circuits that have not yet addressed the issue, there is no need for this Court to step in.

II. The lower courts' consensus is correct and does not conflict with this Court's decisions.

A. CAFA incorporates the settled construction of the term "defendant" as used in other removal statutes.

The construction of CAFA by the courts of appeals reflects a correct application of conventional principles of statutory construction. Home Depot concedes that, in the more than fifty years since the decision in *Shamrock Oil*, the federal courts have consistently recognized that a third-party defendant is not a "defendant" entitled to remove cases under 28 U.S.C. § 1441(a). *See* Pet. 12–13 (citing *Palisades*, 552 F.3d at 332). In enacting CAFA, Congress used the same term—"defendant"—to define the class of parties entitled to remove class actions under the new statute. 28 U.S.C. § 1453(b).

This Court has "often observed that when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its ... judicial interpretations as well.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 590 (2010) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). *See also, e.g., Lamar, Archer & Cofrin, LLP v. Appling*, No. 16-1215, slip op. at 11 (U.S. June 4, 2018); *United States v. Hayes*, 555 U.S. 415, 424–25 (2009); *Rowe v. N.H.*

Motor Transp. Assn., 552 U.S. 364, 370 (2008); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006). This Court specifically recognized the applicability of this interpretive principle to CAFA when it held that, in enacting CAFA, Congress incorporated the established meaning of the term "plaintiffs" as used in Federal Rule of Civil Procedure 20. *Hood*, 571 U.S. at 169–72. As the courts of appeals have recognized, a straightforward application of the principle similarly indicates congressional intent to incorporate the then-existing understanding of the scope of the term "defendant" into CAFA.

That reading of the statute finds additional support in section 1453(b)'s express statement that class actions are to be removed "in accordance with section 1446." Section 1446, which specifies procedures applicable to removals under section 1441 and other removal statutes, echoes both *Shamrock Oil* and section 1441(a) in referring to removal by "[a] defendant or defendants." 28 U.S.C. § 1446(a); *see Tri-State Water*, 845 F.3d at 354 ("Sections 1441 and 1446 use the *Shamrock Oil* definition of the word 'defendant.'"). It would be extremely odd—even "incoherent," *Tri-State Water*, 854 F.3d at 354—to give the word "defendant" in section 1453(b) a more expansive meaning when that section incorporates by reference procedures that themselves apply only to the traditional class of defendants.

The inference that CAFA incorporates the pre-existing understanding of the term "defendant" is strongly supported by the fact that, when Congress intended CAFA to override limits on federal diversity jurisdiction and removal formerly applicable to class actions, it did so explicitly. Thus, for the class actions to

which it applies, CAFA expressly supplanted the following judicial and statutory restrictions on diversity and removal jurisdiction:

- the holdings of *Strawbridge v. Curtiss*, 7 U.S. 267 (1806), and *Snyder v. Harris*, 394 U.S. 332 (1969), that complete diversity of citizenship of named plaintiffs and defendants is required for diversity jurisdiction, superseded for class actions by 28 U.S.C. § 1332(d)(2);
- the holding *of Zahn v. International Paper Co.*, 414 U.S. 291 (1973), that damages claims of class members may not be aggregated to satisfy amount-in-controversy requirements, superseded for class actions by 28 U.S.C. § 1332(d)(6);
- the holding of *Chicago, Rock Island & Pacific Ry. v. Martin*, 178 U.S. 245 (1900), requiring all defendants to join in removal of a case from state court, superseded for class actions by 28 U.S.C. 1453(b);
- the statutory prohibition on diversity removal by defendants sued in their home states, *see* 28 U.S.C. § 1441(b), superseded for class actions by 28 U.S.C. § 1453(b);
- the statutory prohibition on removing an action on diversity grounds more than one year after it is first filed, *see* 28 U.S.C. § 1446(c), superseded for class actions by 28 U.S.C. § 1453(b); and
- the statutory prohibition on appeals of orders remanding removed cases to state courts, *see* 28 U.S.C. § 1447, altered for class actions by 28 U.S.C. § 1453(c).

In each instance, unmistakable statutory language overrides the preexisting judicial or statutory limit on

jurisdiction. Moreover, the statute's legislative history expressly identifies the specific judicial decisions and statutory provisions that CAFA supplants. *See, e.g.*, S. Rep. No. 109-14, at 9 n.2, 10, 48–50 (2005). By contrast, nothing in the statutory language calls for a different construction of the term "defendant" from that in preexisting removal statutes, and the legislative history suggests no intent to render *Shamrock Oil* inapplicable. The decision is not mentioned as a problem in the Senate Report. And Home Depot has not identified any indication anywhere in the eight years of legislative proceedings leading to CAFA's enactment of an intent to override the settled construction of "defendant."

Furthermore, the legislative history contains strong indications, in addition to the repetition of language with a settled meaning, that Congress intended to leave untouched the category of parties entitled to remove. At various points in Congress's consideration of CAFA, draft legislation expanded the parties entitled to remove class actions beyond defendants to include plaintiff class members. *See, e.g.*, Class Action Fairness Act of 1998, S. 2083; Interstate Class Action Jurisdiction Act of 1999, H.R. 1875; Class Action Fairness Act of 2002, H.R. 2341; Class Action Fairness Act of 2003, S. 274. Congress ultimately chose to revert to permitting removal only by a "defendant," in line with the existing removal statute, 28 U.S.C. § 1441(a).

B. Home Depot's arguments for a different construction of CAFA are unpersuasive and provide no reason for review by this Court.

Home Depot's argument that the language of CAFA supports an expanded definition of "defendant"

rests principally on the phrase in § 1453(b) stating that a class action "may be removed by any defendant without the consent of all defendants." Home Depot, like all the prior litigants that have argued that CAFA altered the definition of "defendant," contends that the statute's use of the word "any" indicates an intent to expand the category of "defendants" who are entitled to remove.

The courts of appeals have unanimously rejected this argument, and for good reason. Viewed in context, the meaning of the word "any" is as part of a unitary phrase intended to make clear that, in contrast to earlier removal statutes that required all defendants to join in or consent to removal of an action, under CAFA any one (or more) defendant may remove without the consent of all. *See* Pet. App. 7a; *Tri-State Water*, 845 F.3d at 353, 355; *MERS*, 680 F.3d at 854; *Westwood*, 644 F.3d at 804; *First Bank*, 598 F.3d at 917; *Palisades*, 552 F.3d at 335–36; *see also* S. Rep. No. 109-14, at 49 (explaining the purpose of the phrase). As Judge Easterbrook put it in *First Bank*, the function of the word "any" in this phrase "is to establish that a single defendant's preference for a federal forum prevails," notwithstanding the requirement of unanimity applicable to other removal statutes. 598 F.3d at 917.

Home Depot argues that this construction renders the word "any" superfluous because the same result could have been achieved with the word "a." That Congress may have two ways of expressing a phrase to achieve the same result, however, does not make its choice of one of them superfluous and require giving it something other than its natural meaning. *See, e.g.*, *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 236 (2011). Here, Congress had to introduce the word "defendant" either with the article "a" or the adjective "any," and

it chose the word most suited to convey clearly that "any" one defendant may remove without the consent of all defendants: "[T]he use of the word 'any' juxtaposed with the word 'all' was intended to convey the idea of non-unanimity." *Palisades*, 552 F.3d at 335.

The reading of the statute adopted below and by the other courts of appeals both gives meaning to each word of the phrase and interprets the phrase as an integrated whole consistent with the principle of "ordinary English usage" that governs statutory construction. *Flores-Figueroa v. United States*, 556 U.S. 646, 652 (2009). An ordinary speaker of English who wanted to convey the non-unanimity rule that governs CAFA removal would do so just the way Congress did—by saying a class action "may be removed by any defendant without the consent of all defendants."[3] Even if it were correct to characterize that usage as involving some redundancy, giving the phrase its most natural meaning (as the courts of appeals have done) is fully consistent with this Court's recognition that Congress sometimes includes some repetition within statutes to "remove doubt" and that minor instances of redundancy in statutory drafting are common. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

By contrast, Home Depot's argument attempts to avoid the alleged redundancy by giving "any" a meaning it cannot bear. Although the word "any" may be

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[3] Confirmation that a normal English speaker or writer would choose both "any" and "without the consent" to explain the non-unanimity rule can be found in the Senate Report on CAFA, which likewise uses the term "any" in explaining how the statute eliminates the unanimity requirement: "First, any defendant would be able to remove a class action to federal court without the consent of any other defendant." S. Rep. No. 109-14, at 29.

expansive, it is expansive only within the bounds of the word it modifies: It does not expand the category to which it applies. *See United States v. Palmer*, 16 U.S. 610, 531 (1818) (Marshall, C.J.) (phrases introduced by "any" "must ... be limited ... to those objects to which the legislature intended to apply them"). Put another way, "any" is a "catchall" term, but it "does not 'define what it catches.'" *Small v. United States*, 544 U.S. 385, 388 (2005) (quoting *Flora v. United States*, 362 U.S. 145, 149 (1960)). To the extent that a party is not a "defendant" as that term was understood when CAFA was enacted, inserting the word "any" before "defendant" does nothing to bring that party within the realm of those entitled to remove class actions under the statute. As the court explained *Palisades*, "the use of the word 'any' cannot change the meaning of the word 'defendant.'" *Palisades*, 552 F.3d at 335. Thus, as Judge Easterbrook concluded in *First Bank*, the statute's use of the word "any" does not "impl[y] that 'defendant' means something different" from its previously established meaning. 598 F.3d at 917.

Lacking support for its position in the statutory language, Home Depot asserts that the construction given section 1453(b) by the courts of appeals is contrary to this Court's statement in *Dart Cherokee* that courts considering whether a particular case is removable should not apply an "antiremoval presumption." 135 S. Ct. at 554. Both the court below and the Seventh Circuit before it in *Tri-State Water* properly rejected that argument because the reading of CAFA they adopted in no way rests on such a presumption. Indeed, both the Fourth and Seventh Circuits have rejected the existence of any such presumption.

Long before *Dart Cherokee*, the Seventh Circuit not only anticipated that decision's holding that a removing party need not supply proof of jurisdiction in its petition for removal, *see Spivey v. Vertrue*, 528 F.3d 982, 986 (7th Cir. 2008), but also specifically rejected the existence of any "'presumption in favor of remand' when a case has been removed under the Class Action Fairness Act." *Johnson v. Pushpin Holdings, LLC*, 748 F.3d 769, 773 (7th Cir. 2014). *Accord Back Doctors Ltd. v. Metro. Prop. & Cas. Ins. Co.*, 637 F.3d 827, 830 (7th Cir. 2011) ("There is no presumption against federal jurisdiction in general, or removal in particular. The Class Action Fairness Act must be implemented according to its terms, rather than in a manner that disfavors removal of large-stakes, multi-state class actions.").

The Fourth Circuit likewise anticipated *Dart Cherokee*'s holding. *See Strawn v. AT&T Mobility LLC*, 530 F.3d 293, 297 (4th Cir. 2008) ("a [CAFA] defendant filing a notice of removal ... need only *allege* federal jurisdiction"). That court did not apply an "antiremoval" presumption in CAFA cases before *Dart Cherokee* and, following *Dart Cherokee*, disavowed any such presumption well before its decision in this case. *See Scott v. Cricket Commc'ns, LLC*, 865 F.3d 189, 194 (4th Cir. 2017) (Duncan, J.).

In fact, the decisions of the courts of appeals holding CAFA removal unavailable to counter-defendants rest on a different presumption altogether: the presumption that "Congress is aware of the legal context in which it is legislating" and adopts established meanings of terms it uses. *Palisades*, 552 F.3d at 334 n.4; *accord* Pet. App. at 10a–11a; *Tri-State Water*, 845 F.3d at 355. As both the Fourth and Seventh Circuits have recognized, nothing in *Dart Cherokee* calls into

question the application of that principle to CAFA, and this Court's rejection of an "antiremoval presumption" thus does not control the proper resolution of this issue. The insubstantiality of the argument that the consensus of the courts of appeals on this point is contrary to *Dart Cherokee* is demonstrated strikingly by the fact that Judge Niemeyer, who vehemently disagreed with *Palisades* when it was issued, agreed with the majority below that *Dart Cherokee* provides no basis for overturning the Fourth Circuit's holding in that case.

In sum, Home Depot's attacks on the correctness of the decision below are meritless and lack the force necessary to call for the exercise of this Court's discretionary jurisdiction in the absence of any disagreement among the lower courts. Unless and until one or more of the eight circuits that have not yet weighed in on the issue finds some merit in them—an unlikely prospect given their unpersuasiveness—this Court should decline Home Depot's invitation to take up the issue.

III. The policy arguments of Home Depot and its amici do not warrant review.

Home Depot and its amici rest their case for review by this Court heavily on the policy argument, recycled from their request for review last year in *Home Depot v. Bauer*, that the courts of appeals have created a harmful "loophole" allowing significant class actions to be brought in state courts, contrary to the intent they ascribe to CAFA. There is no question that CAFA's purpose was to greatly expand federal jurisdiction, both original and removal, over large class actions—and equally no doubt that it has achieved that purpose and will continue to do so regardless of

whether counter-defendants are permitted to remove cases. That not *all* class claims are removable does not indicate that review by this Court is necessary to fulfill CAFA's purposes.

This Court has emphasized repeatedly that "it is quite mistaken to assume ... that 'whatever' might appear to 'further[] the statute's primary objective must be the law," because "no statute yet known 'pursues its [stated] purpose[] at all costs." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017) (quoting *Rodriguez v. United States*, 480 U.S. 522, 526 (1987)). CAFA certainly does not. As the Seventh Circuit pointed out in *Tri-State Water*, "CAFA only *selectively* increased federal jurisdiction over multi-state class actions." 845 F.3d at 357. "[I]t established restrictions on what class actions the federal courts could and could not entertain" rather than "roll[ing] out the welcome mat for all multi-state class actions." *Id.* Given the lack of statutory language supporting Home Depot's arguments and the specific indications that the statute's purpose was not to grant federal jurisdiction over *all* large multistate class actions, Home Depot "would need some monster arguments on this score to create doubts" about statutory meaning. *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 138 S. Ct. 1061, 1072 (2018).

The arguments of Home Depot and its amici are not monsters, but chimeras. Despite their claims that the approach of the courts of appeals will permit large-scale evasion of CAFA, the reality is quite different. Over the course of more than a dozen years since CAFA's enactment, the issue of removability of class counterclaims has produced a grand total of eight appellate decisions in only four circuits. One would think that a true nationwide problem might have generated

cases in the vast and populous swaths of the country covered by the First, Second, Third, Fifth, Eighth, Tenth, Eleventh, and D.C. Circuits. Aside from the federal appellate decisions on the subject, petitioners and their amici identify a relatively small number of class counterclaims that have resulted in district court and state court decisions and that would be subject to removal if their view of the statute were adopted. Reliable statistics are not available, but it seems overwhelmingly likely that these cases are a drop in the bucket compared to the hundreds of class actions filed in or removed to federal court as a result of CAFA, or to state-court class actions that were not removed under CAFA for other reasons.

The reasons that the courts of appeals' decisions have not opened the floodgates are apparent: Consumers and their lawyers have little or no control over where they may be sued.[4] The likelihood that a consumer sued in a collection or other matter in a state court has viable class counterclaims against the plaintiff or other parties likewise depends on factors largely outside the consumer's control. Moreover, even consumer defendants who may possess such claims are very unlikely to have the resources to pursue them. Consumers like Mr. Jackson do not have lawyers on retainer who can evaluate suits against them immediately and look for viable class claims. Indeed, the majority of consumers sued in collection actions have no

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[4] Home Depot complains repeatedly that it, too, had no choice with respect to the state-court forum in which the case was brought. *See, e.g.*, Pet. 12. But Home Depot acknowledges that, under the rule it advocates, even plaintiffs who choose to file actions in state courts will not have to fear that a "wily [consumer's] attorney" can transform the case into a non-removable class action against them. Pet. 22.

legal representation at all. FTC, *The Structure and Practices of the Debt Buying Industry* 45 (Jan. 2013) ("90% or more of consumers sued do not appear in court to defend"). One academic study published in 2014 examined a sample of 4,400 debt buyer lawsuits in Maryland and found that less than two percent of defendants had legal representation. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 Loy. Consumer L. Rev. 179, 187 (2014).

Nor do consumers like Mr. Jackson who are vulnerable to being sued in collection actions "pre-associate" with class action lawyers, in the hope that an unsuspecting corporate plaintiff unwittingly will open up the possibility of a non-removable national class action. Speculation that "wily" class action lawyers are luring corporate plaintiffs into suing their clients in so-called "magnet" jurisdictions to generate non-removable class actions is unrealistic, to say the least.

Even if the parade of horribles envisioned by Home Depot and its amici had substance, the solution would not be for this Court to rewrite the statute. If it were the case that CAFA's failure to provide for removal by parties other than defendants significantly impeded the goals of the legislation, it would be up to Congress to address that problem. As Judge Bybee observed in his concurrence in *Westwood* more than seven years ago, "CAFA achieves this particular result, and if Congress does not like it, Congress should rethink the rule." 644 F.3d at 809 (Bybee, J. concurring). That the bipartisan majorities that supported CAFA have not addressed this issue in the decade since the issue first emerged in the *Progressive* and *Palisades* decisions is not a reason for this Court to step in.

Congress is more than capable of amending the removal statutes when it is dissatisfied with their wording. For example, in late 2011—shortly after the Ninth, Fourth, Sixth and Seventh Circuits had all indicated that CAFA incorporated the settled judicial construction of the term "defendant" in earlier removal statutes—Congress enacted the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which included modifications of 28 U.S.C. §1441(a) and 1446 to (among other things) clarify the operation of the requirement of unanimous consent to removal under those statutes in circumstances where defendants are served at different times. *See* Pub. L. No. 112-63, § 103, 125 Stat. 758, 759–62. In the Act, Congress repeatedly used the term "defendants" to describe the parties entitled to remove under those statutes, with no indication of any intent to alter the construction of that term developed by the courts in the years following *Shamrock Oil*. Aside from a conforming amendment necessary to update a cross-reference, moreover, that Act did not amend CAFA's removal provision.

By contrast, when Congress became aware of a real problem in the administration of CAFA's removal provisions, it did not hesitate to correct it. As originally enacted, 28 U.S.C. § 1453(c)(1), which provides for discretionary appeals of CAFA remand orders, required a party seeking leave to appeal to apply to the court of appeals not *less* than seven days after the remand order. Read literally, that provision that did not limit the time for taking an appeal, but penalized a would-be appellant for seeking leave to appeal too soon. In 2009, Congress fixed the statute by amending it to require that leave to appeal be sought "not more than 10 days after entry of the order." Statutory Time Periods Technical Amendments Act of 2009, Pub. L. No. 111-

16, § 7, 123 Stat. 1607 (amending 28 U.S.C. § 1453(c)(1)).

Congress has not taken any action to revise what Home Depot argues is an unintended "loophole." And Congress has given no indication of dissatisfaction with the courts' construction of the term "defendant" under CAFA or other removal statutes. If Congress has not seen fit to alter its own handiwork, this Court should not credit claims that enforcement of the statute as written undermines CAFA's objectives so profoundly that the Court's intervention is warranted.

Moreover, this case would be a particularly poor choice for addressing the issue even if it otherwise merited review because the class counterclaim here would still be subject to remand even if Home Depot qualified as a defendant entitled to invoke CAFA removal. Not only is there a significant, unresolved issue as to whether CAFA's $5 million amount-in-controversy requirement is satisfied, but, regardless of the resolution of that issue, remand will be required under CAFA's local controversy exception because of the common citizenship of more than two thirds of the class and the other additional counter-defendant, CWS. That the issue Home Depot raises may not even be outcome-determinative in this case is all the more reason not to disturb the consensus of the lower courts on the proper construction of CAFA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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INTRODUCTION

As explained in the Petition, this is the rare case in which certiorari is warranted in the absence of a circuit conflict. Because of broad language in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941)—language that exceeds the question presented or the reasoning of the case—courts of appeals feel compelled to adopt an erroneous and contorted interpretation of clear statutory text. This is also an unusual case because the Brief in Opposition confirms that this is so. Because circuit courts unanimously view their countertextual interpretation of 28 U.S.C. § 1453(b) as *required* by this Court's decision in *Shamrock Oil*, only this Court can restore Congress's intended meaning to the removal provision of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4.

I. Only This Court Can Correct Circuit Courts' Erroneous Interpretation Of *Shamrock Oil*.

A. In *Shamrock Oil*, the "question for decision" was one of "statutory construction": whether the general removal provision then in effect allowed an original plaintiff in a state-court action to remove the action on diversity grounds based on a counterclaim filed by the original defendant. 313 U.S. at 103, 104. The Court examined the text of the operative statute, which authorized removal "by the defendant or defendants" when other requirements were satisfied. *Id.* at 104 & n.1 (quoting 28 U.S.C. § 71 (1940)). The general removal statute previously in effect permitted removal by "either party, or any one or more of the plaintiffs or defendants." *Id.* at 106 (quoting Act of Mar. 3, 1875, ch. 137, § 3, 18 Stat. 470, 471). Congress's deliberate decision to change that so that only "the

defendant or defendants" could remove a case, the Court reasoned, indicated that an original state-court plaintiff could not remove when faced with a counterclaim. *Id.* at 106-108. That textual interpretation, the Court explained, reflected that Congress intended: (1) "to narrow the federal jurisdiction on removal," *id.* at 107; (2) to "require [a state-court] plaintiff to abide his selection of a forum," *id.* at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1886)); and (3) to treat all plaintiffs alike rather than permitting some, but not others, to remove a case, *id.* at 108. The Court therefore held that the phrase "the defendant or defendants" did not include an original plaintiff subject to a counterclaim.

None of those reasons applies to this case, which involves a different statute and a removal-seeking party in an entirely different position. Petitioner Home Depot's only role is as a defendant to respondent Jackson's state-court class-action counterclaim; Home Depot is not and has never been a plaintiff in this case. Home Depot also does not rely on a general removal provision, instead invoking a removal statute specifically directed at state-court class actions. Those differences are critical—and Home Depot is not challenging the original plaintiff rule as articulated in *Shamrock Oil*. First, unlike the general removal provision currently in effect, which mirrors the text of the statute at issue in *Shamrock Oil*, 28 U.S.C. § 1441(a) (permitting "the defendant or the defendants" to remove), CAFA authorizes "*any* defendant" to remove a qualifying case, 28 U.S.C. § 1453(b) (emphasis added). By deliberately choosing the expansive modifier "any" rather than the restrictive modifier "the," Congress created a *broader* class of parties entitled to remove.

Second, while the Congress that enacted the provision at issue in *Shamrock Oil* intended to narrow removal jurisdiction, the Congress that enacted CAFA intended the opposite. *See Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). Third, even if the Congress that enacted CAFA had intended to require a state-court plaintiff to abide by its choice of forum, that interest would not be implicated by Home Depot's removal—because Home Depot was dragged into state court involuntarily as an original defendant to a class-action counterclaim. Finally, Home Depot's removal does not require Congress or courts to distinguish between plaintiffs who are entitled to remove and plaintiffs who are not—because Home Depot is not a plaintiff.

The statutory holding and reasoning of *Shamrock Oil* therefore do not apply here, where an original defendant to a state-court class-action counterclaim seeks to remove the class action pursuant to CAFA. But circuit courts unanimously hold otherwise—not based on the text or purposes of CAFA but based on overly broad language in *Shamrock Oil*.

Although the statutory phrase at issue in *Shamrock Oil* was "the defendant or defendants," the Court suggested several times that it was interpreting the term "defendant" rather than the more limited phrase "the defendant." 313 U.S. at 105, 107. Taking seriously this Court's admonitions that lower courts must follow the letter of this Court's decisions, circuit courts have felt constrained to interpret "defendant," when used in removal provisions, to conform to this Court's interpretation of "the defendant" in *Shamrock Oil*. Courts have thus held that "defendant," when used in Section 1441(a), cannot include a newly added

defendant to a counterclaim. *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to [added counterclaim defendants.]").

In addition, every circuit court to consider the question presented here has relied on this Court's supposed definition of "defendant" to hold that a newly added defendant to a class-action counterclaim may not remove the class action under CAFA because *Shamrock Oil* dictates that such a defendant is not "any defendant" under CAFA, 28 U.S.C. § 1453(b). *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex v. Contreras*, 644 F.3d 799, 804-805 (9th Cir. 2011); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.). Those counter-textual holdings are plainly incorrect—but because they are based on a long-time misunderstanding of the scope of *Shamrock Oil*, "only the Supreme Court can now rectify" that pervasive contortion of clear statutory text. *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc).

B. Remarkably, Jackson's Brief in Opposition confirms this state of play. Jackson agrees that circuit courts view *Shamrock Oil* as setting in stone a definition of "defendant" for all present and future removal provisions. And yet, Jackson does not even attempt to ground that broad view of *Shamrock Oil* in the language or reasoning of that decision—a glaring omission that reinforces Home Depot's view that the broad language circuit courts rely on does not accurately reflect the scope of *Shamrock Oil*'s holding.

Jackson's contention (BIO 13) that the unanimity among lower courts reflects their independent "construction of CAFA" rather than their application of broad language in *Shamrock Oil* is belied by the rest of his brief, which confirms that lower courts view *Shamrock Oil* as establishing the meaning of "defendant" in all removal statutes, rather than as construing the meaning of the phrase "the defendant or defendants." *See, e.g.*, BIO 5, 9, 11, 15, 16, 18-19. Jackson's implication (BIO 13) that circuit courts can simply decline to apply what even Jackson views as this Court's *definition* of "defendant" in *Shamrock Oil* is therefore disingenuous.

As the Petition disclosed (Pet. 9), circuit courts agree on the answer to the question presented. But, as Jackson's Brief in Opposition confirms, that agreement is based on adherence to overly broad language in a decision of this Court rather than on the text, structure, or purpose of CAFA. Because only this Court can correct the circuit courts' errant course, the Court should grant the Petition. *See Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1310 (2017) (Thomas, J., concurring in part and dissenting in part) (noting that the Court granted certiorari "despite the absence of a circuit conflict" to clarify the meaning of the Court's own precedents).

II. Circuit Courts Have Adopted A Counter-Textual Interpretation Of CAFA.

Jackson's textual arguments about Section 1453(b) do not hold water. Each reduces to the argument that *Shamrock Oil*'s supposed definition of "defendant" controls this statutory provision that was enacted 64 years later and uses the word "defendant" in

a different way. That strongly indicates both that Jackson's statutory argument is wrong and that this Court's intervention is necessary to restore Section 1453(b)'s plain meaning.

Home Depot's statutory argument is simple: "any defendant" means any defendant—or at least any party that is *only* a defendant. Jackson's contention (BIO 21) that Home Depot "[l]ack[s] support for its position in the statutory language" is laughable. The statutory language at issue—"any defendant"—could scarcely be clearer. The word "any" means "one or some indiscriminately of whatever kind," *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); the word "defendant" means "[a] person sued in a civil proceeding," *Black's Law Dictionary* 508 (10th ed. 2014). Home Depot is "any defendant" and was entitled to remove Jackson's class-action claims against it. Far from inviting "this Court to rewrite the statute" (BIO 26), Home Depot asks the Court to confirm that the statute means what it says. Although Jackson acknowledges (BIO 20-21) that "any" is an "expansive" word, he nevertheless argues that "any defendant" in Section 1453(b) cannot mean what it says—because "any" cannot "expand the category to which it applies" and in Jackson's view, this Court narrowly defined "defendant" in *Shamrock Oil*. That is the same reasoning employed by the circuit courts, and only this Court can set the record straight.

Home Depot agrees with Jackson (*see* BIO 14) that the question presented is one of statutory construction and congressional intent. And Congress could not have chosen broader—or clearer—language to express its view that *any* defendant to qualifying class-action

claims can remove those claims to federal court. Even Jackson's merits argument to the contrary confirms the need for this Court's immediate intervention. Jackson contends (BIO 18-19) that Home Depot argues "that the language of CAFA supports an expanded definition of 'defendant.'" That is simultaneously untrue and a perfect illustration of why only this Court can correct the erroneous course lower courts feel bound to follow. Home Depot argues for an ordinary and commonsense definition of "defendant"—the same one that is used in the Federal Rules and throughout other federal statutes. Home Depot also argues for a commonsense interpretation of the phrase "any defendant"—one that adheres to this Court's admonitions that the word "any" is expansive. *See, e.g.*, *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). The only way to view Home Depot's plain-text argument as seeking "an expanded definition of 'defendant'" is to view *Shamrock Oil* as establishing the meaning of "defendant" for all removal statutes from that moment forward. And that *is* how circuit courts view *Shamrock Oil*, which is precisely why this Court should step in now to clarify that *Shamrock Oil*'s holding is limited to the phrase "the defendant or defendants."

Jackson suggests (BIO 11) the ordinary meaning of "defendant" in CAFA "does not extend to 'counterclaim defendants,' 'third party defendants,' or 'additional counter-defendants.'" Home Depot, of course, is none of those. Jackson simultaneously acknowledges (BIO 16) this Court's holding in *Mississippi ex rel. Hood v. AU Optronics Corp.*, that when Congress used "plaintiffs" in CAFA, it intended the term to have its ordinary meaning as used in the Federal Rules of Civil

Procedure. 571 U.S. 161, 169-170 (2014). There is no reason "defendant" in CAFA's removal provision should be given any different treatment—and the Rules plainly consider an original defendant to a counterclaim to be a "defendant." *See, e.g.*, Fed. R. Civ. P. 12. Jackson and the circuit courts have contorted the term "defendant" to exclude parties who are obviously defendants—because, they say, such a contortion is required by *Shamrock Oil*.

Jackson also relies on the maxim that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" BIO 15 (quoting *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 559 U.S. 573, 590 (2010)) (alteration in original). He points out (*ibid.*) that in the decades between the decision in *Shamrock Oil* and the enactment of CAFA, circuit courts construed the general removal provision in Section 1441(a) not to authorize removal by a counterclaim defendant—and argues (BIO 15-16) that Congress must have intended to incorporate that understanding into CAFA's removal provision. That is incorrect. That maxim has no application here because the phrase "any defendant" has no settled judicial understanding. The cases Jackson relies on, like *Shamrock Oil* itself, interpreted statutory language that is *different* from the language at issue in this case. Section 1441(a) uses the phrase "the defendant or the defendants," which is the same phrase (with the addition of one "the") the Court construed in *Shamrock Oil*. But nothing suggests that Congress intended to incorpo-

rate a judicial understanding of *that* phrase when it used a *different* phrase in CAFA.

Jackson's reliance on 28 U.S.C. § 1446 is also unavailing. Section 1453(b) instructs that "[a] class action may be removed to a district court of the United States in accordance with section 1446." Jackson argues (BIO 16) that the incorporation of Section 1446's procedures would not work if the phrase "any defendant" were given its ordinary meaning. That is incorrect. Jackson argues (*ibid.*) that Section 1446 "echoes" Section 1441 when it uses the phrase "[a] defendant"—but that phrase does not appear anywhere in the relevant provision of Section 1441, which instead uses the phrase "the defendant or the defendants." 28 U.S.C. § 1441(a). Unlike Sections 1441(a) and 1453(b), Section 1446 does not define, expand, or restrict the category of defendants entitled to remove. Section 1446 simply establishes the procedures under which a qualifying defendant can remove. Section 1453(b) establishes which defendants can remove a class action ("any defendant"); Section 1441(a) establishes which defendants can remove a qualifying civil action ("the defendant or the defendants"); and Section 1446 provides the mechanism for removal by "[a] defendant or defendants desiring to remove any civil action from a State court," 28 U.S.C. § 1446(a). If either Section 1453(b) or Section 1441(a) empowers a defendant to remove a case, it must follow the procedures in Section 1446(a). The scheme could hardly be *more* "[]coherent" (*contra* BIO 16).

Finally, Jackson correctly states (BIO 17) that, in enacting CAFA, Congress supplanted the requirement of unanimity among defendants as a prerequisite to removal. But Jackson repeats the mistake of the

Fourth Circuit, *see* Pet. App. 7a, in arguing (BIO 19-20) that Congress used the word "any" to modify "defendant" for the sole purpose of eliminating the unanimous-consent rule—even though Congress accomplished that goal by stating that a defendant can remove an eligible class action "without the consent of all defendants." 28 U.S.C. § 1453(b). Because "[a]n ordinary speaker of English who wanted to convey" that any defendant, including an original defendant to a counterclaim, may remove a class action "would do so just the way Congress did," (BIO 20), Section 1453(b) should be given its ordinary meaning.

III. The Question Presented Is Important And Recurring.

As explained in the Petition (Pet. 22-25) and in the three supporting *amicus* briefs, the question presented is important and recurring. The circuit courts' countertextual interpretation of CAFA's removal provision has created a roadmap for circumventing CAFA's goal of ensuring that defendants in qualifying class actions may defend themselves in federal court.

Jackson does not meaningfully contest that lower courts' *Shamrock-Oil*-inspired reading of Section 1453(b) creates a loophole in CAFA's protections. If Jackson had asserted non-class-action claims against Home Depot, Home Depot could not have removed. But Jackson and his attorneys instead hijacked Citibank's effort to collect on Jackson's unpaid credit card bill as an opportunity to assert class-action claims against Home Depot (which was not a party to the collection dispute), betting that the Fourth Circuit's decision in *Palisades*, *supra*, would keep the class action in state court. That is not what Congress intended.

Jackson argues (BIO 25-26) that most collection actions do not spawn class-action counterclaims. That is true—but that is not a response to the point that lower courts' counter-textual interpretation of Section 1453(b) has created a roadmap for class-action lawyers to elude CAFA's removal provisions. The point is not that every collection action will spawn a class-action counterclaim; the point is that class-action lawyers can easily create a situation in which they can file otherwise removable class-action claims and feel confident they will remain in state court. That sort of gamesmanship by lawyers is precisely what CAFA was intended to combat. *See, e.g.*, S. Rep. No. 109-14, at 4 (2005).

Jackson's suggestion (BIO 2) that defendants like Home Depot should "take their complaint to Congress" also misses the mark. Congress *has already acted* to ensure that "any defendant" can remove a qualifying state-court class action. 28 U.S.C. § 1453(b). But lower courts are ignoring that plain text based on "a false [statutory] premise of this Court's own creation." *South Dakota v. Wayfair, Inc.*, No. 17-494 (U.S. June 21, 2018), slip op. 18. Because "[i]t is currently the Court, and not Congress, that is limiting" the scope of removal jurisdiction, *ibid.*, this Court should step in to clarify the proper scope of *Shamrock Oil*.

Finally, Jackson's passing suggestion (BIO 28) that this case is a poor vehicle for resolving the question presented because Jackson has raised other issues that might support a remand to state court should be rejected. Congress directed that such issues should be decided by a federal court when it authorized removal by "any defendant." 28 U.S.C. § 1453(b). That cannot happen unless this Court intervenes.

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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No. 17-1471

In The
Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation for the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To help foster these objectives, DRI participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Achieving *fairness* in class-action litigation—beginning with the critical need for an impartial court to decide whether a putative class action can proceed beyond the pleadings, and if so, whether a

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI–The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief. As required by Supreme Court Rule 37.2(a), the parties' counsel of record received timely notice of *amicus curiae*'s intent to file this brief. Petitioner's and Respondent's counsel of record have consented to the filing of this brief.

class should be certified—is extraordinarily important to DRI, its members, and their clients. For this reason DRI has filed in this Court a substantial number of *amicus* briefs which present the civil defense bar's views and practical perspective on legal issues that implicate class-action fairness, such as the class-action removal question here. By way of example, DRI's merits-stage *amicus* brief in *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (filed May 29, 2014), argued that there should be no "presumption against removal" under the Class Action Fairness Act ("CAFA")—a position with which the Court agreed. *See Dart Cherokee*, 135 S. Ct. 547, 554 (2014) (holding that "no antiremoval presumption attends cases under CAFA").

Because class-action fairness is fundamental to civil justice, DRI's Center for Law and Public Policy maintains a Class Action Task Force, which monitors major class actions throughout the United States and recommends legislative and judicial reforms. Through the Center, DRI has written to and testified before congressional committees about the compelling need to establish and maintain class-action fairness, including with regard to a defendant's right to remove interstate class actions (i.e., class actions against national or multi-state defendants) from state to federal court. *See, e.g.*, *The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of John Parker Sweeney, President, DRI–The Voice of the Defense Bar).

The brazen, recurring, removal-blocking tactic involved in this appeal conflicts with the plain text of CAFA. More fundamentally, in view of many state trial courts' pronounced bias against nationwide and out-of-state corporate defendants, the increasingly utilized anti-removal ploy at issue here is strikingly incompatible with class-action fairness.

CAFA's expanded removal provision, 28 U.S.C. § 1453(b), expressly authorizes "any defendant" to remove a qualifying class action to federal district court. It is intended "to ensure that class actions that are truly interstate in character can be heard in federal court," where "such cases properly belong," and thereby eliminate or mitigate a "parade of abuses" both by "plaintiff-friendly" state courts and class-action plaintiffs' lawyers, who typically enjoy "unbounded leverage" in those courts. S. Rep. No. 109-14, at 5, 6, 20, 27 (2005) ("Senate Report"). As the petition for a writ of certiorari explains, however, four circuits have adopted a rule, based on broad language in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), which enables class-action plaintiffs to easily circumvent § 1453(b).

Under this rule, removal can be avoided or defeated through the expedient of recruiting a defendant in a garden-variety state-court debt-collection action (or other mundane lawsuit) to file a much broader, but only tangentially related, class-action *counterclaim*—not only against the suit's original plaintiff, but also against an *additional, previously uninvolved* defendant, such as Petitioner Home Depot here. The circuits' rule, which embodies a narrow, text-averse interpretation of § 1453(b),

precludes any such additional class-action defendant—not just the original counterclaim defendant (i.e., the plaintiff in the original suit)—from removing the class action. *See Tri-State Water Treatment v. Bauer*, 845 F.3d 350 (7th Cir.), *cert. denied*, 137 S. Ct. 2038 (2017); *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011); *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008). Similarly, although § 1453(b) twice refers to "any defendant," the current rule would preclude a previously uninvolved defendant served with a third-party class-action complaint from removing the case to federal court. *See In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012).

DRI defers to Petitioner's sensible, plain-text interpretation of § 1453(b), Pet. at 17-22, and its discussion, *id.* at 10-16, concerning why the Court's nearly 80 year-old opinion in *Shamrock Oil* does not control the CAFA "additional counterclaim defendant" removal question presented by this appeal. Rather than repeating Petitioner's points, this *amicus* brief highlights, from the defense bar's perspective, the reasons why excluding an additional counterclaim defendant (or a third-party defendant) from the right to remove a putative interstate class action under § 1453(b) defeats, rather than promotes, CAFA's objectives.

SUMMARY OF ARGUMENT

Although "[c]lass action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims . . . there have been abuses of the

class action device that have . . . undermined public respect for our judicial system." 28 U.S.C. § 1711 note (CAFA §§ 2(a)(1) & (2), Pub. L. 109–2) (CAFA Findings & Purposes). Those abuses include "keeping cases of national importance out of Federal court." *Id.* (§ 2(a)(4)(A)). One of the congressionally identified purposes of CAFA, therefore, is "providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." *Id.* (§ 2(b)(2)).

The CAFA removal provision at issue in this appeal, 28 U.S.C. § 1453(b), is intended to ensure that interstate class actions are adjudicated (or settled) in federal court. Section 1453(b) accomplishes this objective by vesting "*any defendant*" (emphasis added) with authority to remove a putative class action over which federal district courts have diversity jurisdiction under § 1332(d)(2).

The purpose of § 1453(b) is defeated if the broad and unequivocal term "any defendant" is interpreted to exclude a defendant that was not previously a party in a peripherally related state-court suit and is served with a class-action counterclaim *rather than* a class-action complaint in a separate suit. Barring such an additional defendant from removing a class-action counterclaim under § 1453(b), even though § 1453(b) authorizes the same defendant to remove a separate class-action complaint containing identical allegations, places form over substance.

This Court's review is needed to prevent forum-shopping plaintiffs' lawyers from evading CAFA removal and forcing national defendants to litigate or

settle class-action claims in plaintiff-friendly state courts. Without the Court's intercession, the state-court class-action abuses that CAFA was enacted to remedy will continue to deprive class-action defendants, and also legitimate class-action plaintiffs themselves, of civil justice.

ARGUMENT

Review is needed because excluding additional class-action counterclaim defendants, and third-party class-action defendants, from the expanded right to remove under § 1453(b) perpetuates state-court abuses that CAFA was enacted to rectify

A. CAFA is intended to facilitate removal of class actions in order to avoid state-court abuses that favor class-action plaintiffs and their lawyers

CAFA's fundamental purposes include "expanding federal jurisdiction over interstate class actions," which "typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit." S. Rep., *supra* at 5; *see Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013) ("CAFA's primary objective [is] ensuring 'Federal court consideration of interstate cases of national importance.'") (quoting CAFA § 2(b)(2), Pub. L. No. 109–2, 119 Stat. 5 (2005)); *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 739 (2014) (discussing how CAFA "loosened the requirements for diversity jurisdiction for . . . 'class actions' and 'mass actions'").

Indeed, the detailed Senate Report that accompanied CAFA explains that "[i]nterstate class actions which often involve millions of parties from numerous states—present the precise concerns that diversity jurisdiction was designed to prevent." S. Rep. at 6. By enacting CAFA, "Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to *further* the proper balance of federalism and 'restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction.'" *Palisades Collections LLC v. Shorts*, 552 F.3d at 342 (Niemeyer, J., dissenting) (quoting CAFA § 2(b)(2)).

The Fourth Circuit observed here that "CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules" in order to "'curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts.'" App. 4a-5a (quoting *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 952 (9th Cir. 2009)). The Senate Report explains that CAFA "makes it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S. Rep., *supra* at 5; *see id.* at 10 ("*How Diversity Jurisdiction and Removal Statutes Are Abused*"). Defeating removal jurisdiction for interstate class actions would "subvert the intent of the Act." *Id.* at 48.

The Senate Report provides a catalog of class-action abuses "undermining the rights of both plaintiffs and defendants" when plaintiffs' lawyers

are able to "keep nationwide or multi-state class actions in state courts" that flout "basic fairness and due process considerations." *Id.* at 4. For example—

- *"Judicial blackmail forces settlement of frivolous cases."* *Id.* at 20-21.
- *"Lawyers receive disproportionate shares of settlements."* *Id.* at 14-20.
- *"Some magnet state courts easily certify national class actions."* *Id.* at 22-23.
- *"Copy cat class actions clog the courts and permit forum shopping."* *Id.* at 23.

This Court should grant review and hold that the § 1453(b) right-to-remove encompasses class-action counterclaim defendants that were not parties in the original state-court litigation, and also defendants served with third-party class-action complaints. Absent review, class-action plaintiffs' lawyers will be able to continue evading removal of interstate class actions—especially those filed in class-action "magnet" courts—and thereby obstruct the intent of CAFA in general and § 1453(b) in particular.

B. Court of Appeals decisions narrowly construing § 1453(b) fail to take into account CAFA's fundamental objective of achieving fairness by insulating class actions from state-court abuses

The Fourth Circuit opinion affirming remand of this case acknowledges that Congress "expanded removal authority for class actions" in order "to curb perceived abuses" when class actions are litigated in

state courts. App. 4a. But the court's holding that the expansive and unambiguous phrase "any defendant" in § 1453(b) does not really mean what it says ignores that provision's indisputable purpose of removing most class actions from state trial courts, which often are infected with pro-plaintiff, anti-corporation bias.

The court of appeals adhered to its earlier decision in *Palisades Collections*, which "applied *Shamrock Oil* and held that an additional counter-defendant was not 'the defendant or defendants' because it was not a defendant against whom the original plaintiff asserted a claim." App. 6a (quoting *Palisades Collections*, 552 F.3d at 336). *Shamrock Oil*, however, only addressed the authority of an *original* counterclaim defendant (i.e., the plaintiff in the underlying debt-collection suit) to remove a breach-of-contract counterclaim under the 1887 predecessor to the current and substantially similar general removal statute, 28 U.S.C. § 1441(a). In holding that the general removal provision's reference to "the defendant or the defendants" does not encompass an *original* counterclaim defendant, the Court found "of controlling significance . . . the Congressional purpose *to narrow* the federal jurisdiction on removal" in the 1887 general removal provision compared to its more liberal, 1875 predecessor. *Shamrock Oil*, 313 U.S. at 107 (emphasis added).

Shamrock Oil does not involve class action removal: The Court's 1941 holding based on the *narrowing* of the 1887 general removal statute compared to its 1875 predecessor obviously did not

address the "*expanded* removal authority *for class actions*," App. 4a (emphasis added), that Congress established in 2005 through enactment of CAFA. *See Palisades Collections*, 552 F.3d at 344 (Niemeyer, J., dissenting) ("Section 1453(b), by authorizing 'any defendant' to remove, makes *Shamrock Oil* inapplicable in the CAFA context . . . ."); *see also Dart Cherokee*, 135 S. Ct. at 554 ("CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'") (quoting S. Rep., *supra* at 43); S. Rep., *supra* at 6 (indicating that "the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966"). Nor does *Shamrock Oil* take into account the congressional intent—the objective of avoiding state-court class-action abuses—underlying CAFA's expansion of class-action removal authority by any defendant.

Neither the panel opinion here, nor the majority opinion in *Palisades Collections*, expresses any concern about the practical consequences of its short-sighted § 1453(b) interpretation: Allowing class-action plaintiffs and their lawyers to dodge removal simply by filing a class-action counterclaim or third-party class-action complaint enables them to continue perpetrating the types of state-court class-action abuses that CAFA was enacted to prevent. The other circuit opinions that have addressed the issue are equally myopic.

Consider the Ninth Circuit majority opinion in *Westwood Apex v. Contreras*, 644 F.3d 799 (2011). According to that opinion, Congress could not have

"intended to modify the original defendant rule" ("limiting the right of removal to original defendants") because "there is no mention of '*Shamrock Oil*' or 'third-party' or 'counterclaim defendant' in the entirety of the Senate Report." *Id.* at 806; *see also In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 854 (adopting *Westwood Apex*). Lack of congressional intent should not be inferred, however, merely because the 2005 Senate Report failed to explicitly anticipate the post-CAFA anti-removal gambit at issue in this appeal. Indeed, in his separate opinion in *Westwood Apex*, Judge Bybee explained "[i]t is thus counterintuitive that CAFA does not authorize the removal of this suit . . . the removing parties . . . were forced into state court when [the original defendant] transformed a $ 20,000 debt-collection lawsuit into an unrelated multi-million dollar class action by filing a counterclaim not only against the original plaintiff, but also against the removing parties." *Id.* at 807, 809 (Bybee, J., concurring).

Also consider the Seventh Circuit's 2017 opinion in *Tri-State Water Treatment v. Bauer*, 845 F.3d 350, which like the present case, involves a counterclaim class action against Home Depot. *Tri-State* "began as a simple collection action brought in the Small Claims Court of Madison County, Illinois." *Id.* at 352. The defendant transformed that collection suit into a "multi-state class action" alleging consumer fraud against the original plaintiff and *additional* counterclaim defendants, including Home Depot. *Id.* Home Depot removed the case to federal court under § 1453(b). Affirming the district court's remand, the

court of appeals indicated that although "CAFA made some changes to the removal rules for large, state-law based class actions," keeping the multi-state class action litigation in Madison County, Illinois state court somehow would do the "least damage to . . . litigation efficiency." *Id.* at 354, 355. Oblivious to reality, the court of appeals disagreed with Home Depot's contention that requiring class-action counterclaims to remain in state court "would re-introduce the forum-shopping CAFA was designed to eliminate." *Id.* at 356. According to the court, "state courts have all the tools they need to manage abusive amendments to pleadings." *Id.* at 357.

C. State-court class-action abuses will continue unabated unless this Court grants review and holds that the right to remove under § 1453(b) encompasses additional class-action counterclaim defendants and third-party class-action defendants

Class actions continue to be a major burden on American industry. A recent survey indicates that—

- Class-action spending continues to rise annually. Companies spent $2.24 billion on class actions in 2017.

- The magnitude of class-action exposure and risk also continues to increase.

- Almost 70% of companies face one or more class actions on a continuing basis.

- Consumer fraud claims remain the second most prevalent type of class action.

- Class-action settlement rates have increased to more than 70%.

Carlton Fields Jorden Burt, P.A., *The 2018 Carlton Fields Class Action Survey* 1-2 (2018), https://classactionsurvey.com. The high settlement rate is particularly troubling since as the Senate Report explains, "lawyers, not plaintiffs, may benefit most from settlements . . . the attorneys receive excessive attorneys' fees with little or no recovery for the class members themselves." S. Rep., *supra* at 14.

The fact that class actions continue to proliferate and impose heavy costs and burdens on businesses and industries underscores the need to ensure that all of CAFA's pivotal features are implemented. This includes the expanded class-action removal authority that § 1453(b) expressly confers upon "any defendant." But as the certiorari petition explains, the Fourth, Sixth, Seventh, and Ninth Circuit decisions cabining the scope of § 1453(b) "provide a roadmap for circumventing the clear purpose of the Act." Pet. at 22. In fact, two of those circuits geographically encompass three of what the American Tort Reform Association describes as the nation's worst "judicial hellholes"—California; Madison County, Illinois; and Cook County, Illinois. *See* American Tort Reform Ass'n, *Judicial Hellholes (2017-2018)*, http://www.judicialhellholes.org.

Even worse, the civil defense bar's experience is that the injustice of being forced to litigate (or settle) national class actions in state court rather than federal court is not limited to cases filed in "judicial hellholes." For example—

- Many state courts allow putative class-action plaintiffs to conduct full-blown merits discovery prior to certification.

- Class-certification criteria in many state courts are lenient compared to Federal Rule of Civil Procedure 23(a) standards, or applied flexibly in a manner that usually favors certification.

- Unlike Federal Rule of Civil Procedure 23(f), many state courts do not have a procedure for interlocutory review of class certification.

- Compared to federal courts, state courts are generally reluctant to grant summary judgment or otherwise dismiss a class action prior to trial.

- Many state courts either have not adopted *Daubert*-type standards for admission of expert testimony or liberally allow questionable expert testimony to support certification and/or class-action plaintiffs' claims on the merits.

In sum, as the CAFA Senate Report explains, numerous problems can be attributed to adjudicating class-actions in state courts, "where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over

litigation procedures and proposed settlements." S. Rep., *supra* at 4.

Unjust, and sometimes unprincipled and unscrupulous, certification and adjudication of class-actions by a significant number of state-court judges, whose views (and often allegiance) slant toward the plaintiffs' bar, place national or multi-state "deep pocket" corporate defendants under tremendous pressure to settle even frivolous class-action complaints. *See id.* at 21 ("Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."). In the majority of cases, class certification, especially in state court, sounds the "death knell" of the litigation for the defendants. No matter how unfounded class-action claims or unwarranted class certification may be, the pressure on a defendant to settle a newly certified class action is enormous. *See generally Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 1212 n.9 (Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification).

The level playing field that Congress sought to sow through CAFA cannot be achieved if plaintiffs' lawyers can circumvent § 1453(b) removal simply by tacking a class-action counterclaim against previously uninvolved national defendants onto a

run-of-the-mill debt-collection suit in a carefully chosen state court. Since all four circuits that have addressed the issue believe they are bound by *Shamrock Oil*, only this Court can clarify the scope of that mid-1900s opinion and put today's class-action plaintiffs' bar into its proper place, which is *federal* court.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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No. 17-1471

In the Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with 90 corporate members representing a broad cross-section of American industry. (A current list of PLAC's corporate members can be found at https://plac.com/PLAC/Who_We_Are/Membership/PLAC/Membership/Corporate%20Membership.aspx.) These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product manufacturers.

PLAC's corporate members are frequently defendants in class actions and other mass proceedings. PLAC's members have a strong interest in this

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

case because the court of appeals' decision erroneously construes this Court's decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), interpreting the general removal statute to in turn endorse an interpretation of the Class Action Fairness Act that conflicts with both its text and purpose. The decision below thus allows plaintiffs to avoid federal jurisdiction over important, interstate class actions that Congress intended to be heard in federal court by the simple expedient of provoking a collection action by non-payment and then bringing the class action as a counterclaim instead of an independent lawsuit. That approach denies businesses—including many of PLAC's members—the very access to federal courts that Congress sought to provide in enacting CAFA. And only this Court can correct the misunderstanding of *Shamrock Oil* that has led to this result.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below is the latest in a long pattern of cases in which the lower courts have misapprehended a critical and recurring question under the Class Action Fairness Act of 2005 (CAFA). That statute, intended to move significant interstate class actions into federal court, has been described as "the most significant legislative reform of complex litigation in American history." Lonny Sheikopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008).

Here, following the Fourth Circuit's earlier split decision in *Palisades Collections LLC* v. *Shorts*, 552 F.3d 327 (4th Cir. 2008), and similar decisions from the Sixth, Seventh, and Ninth Circuits, the court below concluded that a defendant that was newly added to an individual collections action as the target of

an interstate class action seeking millions of dollars was foreclosed from removing the lawsuit to federal court because the class action was pleaded as a counterclaim. It is undisputed that the very same claim could be removed to federal court under CAFA if it were pleaded as an independent action.

The lower courts have felt compelled to reach this peculiar result by this Court's decision in *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100 (1941), concluding that *Shamrock Oil* stands for the proposition that only an originally-named defendant in a case has a right to remove the case to federal court. But that overbroad interpretation finds no support in the actual holding of *Shamrock Oil*, which is that an original *plaintiff* who *chooses* a state forum cannot remove a civil action to federal court under the (more restrictive) general removal statute when later named as a counterclaim defendant. *Id.* at 108-09. Alternatively, at a minimum, as Judge Niemeyer put it in his comprehensive *Palisades* dissent, "*Shamrock Oil* [is] inapplicable in the CAFA context." *Palisades*, 552 F.3d at 344 (Niemeyer, J., dissenting); see also *Westwood Apex* v. *Contreras*, 644 F.3d 799, 808 (9th Cir. 2011) (Bybee, J., concurring) ("We extend *Shamrock Oil* today, but ironically we have no occasion to reflect on whether *Shamrock Oil*'s rationale warrants its extension.").

This Court's review is therefore needed to correct these lower court decisions misapprehending *Shamrock Oil*'s holding and improperly extending it to CAFA removals in conflict with that statute's text and purpose. Congress enacted CAFA with the "primary objective" of "ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co.* v. *Knowles*, 133 S.

Ct. 1345, 1350 (2013) (quoting CAFA § 2(b)(2) (codified at 28 U.S.C. § 1711 note)). Toward that end, CAFA expanded diversity jurisdiction and eliminated prior strictures on removal practice. As this Court recently emphasized, CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 554 (2014) (quoting S. REP. NO. 109-14, at 43 (2005)).

As Judge Niemeyer has explained, the lower courts' cramped interpretation of CAFA is "demonstrably at odds" with the statute's "plain language," which authorizes "'*any* defendant'" to remove. *Palisades*, 552 F.3d at 338, 339 (Niemeyer, J., dissenting) (quoting 28 U.S.C. § 1453(b)). A newly-added counterclaim defendant qualifies as "any defendant" under the plain meaning of those words: like petitioner here, such a defendant is haled into court involuntarily to defend an action for relief against it. See also Fed. R. Civ. P. 20(a)(2) (treating persons as "Defendants" "if * * * any right to relief is asserted against them"). There is no logical or textual reason why such a defendant's access to federal court should turn on the happenstance of whether the putative class action against it is brought as a counterclaim. Indeed, the rule adopted below runs headlong into this Court's admonition not to "exalt form over substance" when interpreting CAFA's provisions. *Standard Fire*, 133 S. Ct. at 1350.

Moreover, while Congress enacted CAFA to ensure that plaintiffs' lawyers cannot manipulate pleadings to keep a class action in state court, the decision below invites them to do just that, simply by filing the class action as a counterclaim—for exam-

ple, to a collection action that a consumer deliberately provokes—rather than a stand-alone suit.

Finally, the question presented—whether plaintiffs' lawyers may circumvent an important federal statute through a pleading device—is a recurring one of great consequence. As the practices that led to CAFA's enactment amply demonstrate, plaintiffs' lawyers have proven themselves adept at exploiting loopholes—including the loophole that is the subject of the petition, as PLAC's own members have experienced. Class counsel can be expected to take advantage of every opportunity to keep cases in magnet state courts that apply lax class-certification standards, thus increasing—perhaps dramatically—the likelihood of a "blackmail" settlement that defendants must pay (whether the case is meritorious or not) to guard against the risk of an outsized class-wide judgment. And lower courts, including the Fourth and Seventh Circuits, have explicitly noted that only this Court can close the CAFA loophole that the petition addresses.

This Court's review is therefore essential.

ARGUMENT

I. The Decision Below Is Inconsistent With CAFA's Clear Text And Purpose.

The interpretation of CAFA adopted by the Fourth Circuit is wrong for two independent reasons. First, in authorizing removal by "any" defendant, CAFA unambiguously authorizes removal by a new *counterclaim* defendant. Second, even if the statutory text were ambiguous, CAFA calls for the ambiguity to be resolved in favor of a newly-added counterclaim defendant's right to remove. Any contrary interpretation would undermine the congressional ob-

jectives in enacting CAFA to create a federal forum for interstate class actions with relatively large amounts at stake and to prevent plaintiffs' lawyers from defeating removal through manipulation of pleadings.

A. A newly added counterclaim defendant counts as "any defendant" entitled to remove a putative class action under CAFA.

1. CAFA's removal provision, 28 U.S.C. § 1453(b), states that a class action "may be removed by any defendant." As this Court has observed, a statutory phrase introduced by the word "any" is ordinarily interpreted to have "a broad meaning." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008); accord *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980). "[R]ead naturally," the word "any" means "one or some indiscriminately of whatever kind." *Ali*, 552 U.S. at 219 (quotation marks omitted).

Following this Court's guidance in *Ali* and prior cases, Judge Niemeyer concluded in his *Palisades* dissent that the "plain language" of CAFA "unambiguously grants [a counterclaim defendant] removal authority" and "clearly provides" that an "interstate class action" like the one here may "proceed in federal court." *Palisades*, 552 F.3d at 342, 345 (Niemeyer, J., dissenting).[2] Specifically, he recognized that a

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[2] While Judge Niemeyer was bound by circuit precedent to join the panel opinion below, he had previously expressed the view that "only the Supreme Court can * * * rectify" the Fourth Circuit's "unfortunate" interpretation of CAFA and *Shamrock Oil*. *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc); see also pages 20-21, *infra*.

newly added "*counterclaim* defendant is certainly a 'kind' of defendant and falls easily within 'indiscriminately of whatever kind' of defendant." *Palisades*, 552 F.3d at 339 (quoting *Ali*, 552 U.S. at 219); see also *Deutsche Bank Nat'l Trust Co.* v. *Weickert*, 638 F. Supp. 2d 826, 829 (N.D. Ohio 2009) (agreeing with Judge Niemeyer's analysis "that CAFA expanded removal authority to include parties added as counterclaim defendants to a class action").[3]

That conclusion accords with the plain meaning of "defendant" as simply a "person [or entity] sued in a civil proceeding." BLACK'S LAW DICTIONARY (10th ed. 2014). There can be no serious dispute that petitioner has been "sued in a civil proceeding" and must now face putative class-action claims leveled against it. And that conclusion likewise accords with the Federal Rules of Civil Procedure, with which Congress must be presumed to have been familiar in enacting CAFA. Rule 13(h) says that "Rules 19 and 20 govern the addition of a person as a party to a counterclaim," and Rule 20(a)(2), in turn, treats persons as "Defendants" "if * * * any right to relief is asserted against them." Compare Fed. R. Civ. P. 20(a)(1) (treating as "Plaintiffs" those persons who "assert any right to relief").

2. The court below, like the other circuits to consider this issue, have felt bound to give this peculiar reading to CAFA because of this Court's decision in *Shamrock Oil*. In the Fourth Circuit's view, *Shamrock Oil*'s interpretation of the language "the defendant or the defendants" in the general removal statute

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[3] The Sixth Circuit subsequently sided with the *Palisades* majority. See *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853-54 (6th Cir. 2012).

(now 28 U.S.C. § 1441(a)) grants the right of removal under CAFA *only* to originally-named defendants in a case, even though CAFA uses the broader "any defendant" language. See Pet. App. 4a, 6a-7a, 11a; see also, *e.g.*, *Tri-State Water Treatment, Inc.* v. *Bauer*, 845 F.3d 350, 355 (7th Cir. 2017), cert. denied, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 853; *Westwood Apex*, 644 F.3d at 805-06; *Palisades*, 552 F.3d at 332.

But that judicial expansion of *Shamrock Oil* is unwarranted. The entire rationale for the *Shamrock Oil* decision was that it would be unfair to allow the original *plaintiff*, as the party that had chosen to litigate in state court, to remove the case to federal court once named as a counter-claim defendant. *Shamrock Oil* framed the "question for decision" as "whether the suit in which the counterclaim is filed, is one removable *by the plaintiff* to the federal district court." 313 U.S. at 103 (emphasis added). The Court explained that "the plaintiff, having *submitted himself* to the jurisdiction of the state court, was not entitled to avail himself of a right of removal." *Id.* at 106 (emphasis added). Quoting the legislative history in which Congress had eliminated a prior provision allowing "either party" to remove, the Court emphasized that the reason the modified statute restricted the right to remove to "the defendant" was that Congress believed it to be "just and proper to require the plaintiff to *abide his selection* of a forum" and that, if the plaintiff "*elects* to sue in a State court when he might have brought his suit in a Federal court," there was "no good reason to allow him to remove the cause." *Id.* at 106 n.2 (emphasis added); (quoting H.R. REP. NO. 49-1078, at 1 (1st Sess. 1887)). And the *Shamrock Oil* Court relied (313 U.S. at 105-06, 108) on its prior decision in *West* v. *Aurora*

City, 73 U.S. 139 (1868), which held that "[t]he right of removal is given only to a defendant who has not submitted himself to [the State court's] jurisdiction; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action." *Id.* at 141.

The circumstances in *Shamrock Oil* bear no resemblance to the circumstances of a *new* counterclaim defendant dragged into state court for the first time to defend a class-action counterclaim (as petitioner was here). As Judge Niemeyer pointed out, *Shamrock Oil* "denied a [counterclaim] defendant *who was also a plaintiff* the authority to remove," *Palisades*, 552 F.3d at 340 n.3 (Niemeyer, J., dissenting) (emphasis added), and the holding of *Shamrock Oil* depended on the counterclaim defendant's original status as a *plaintiff*. But, "[o]ver time, the holding of *Shamrock Oil*—that an original plaintiff could not remove the case after a counterclaim was filed—transformed into a rule that only the original defendant could remove the case"—even though *Shamrock Oil* itself "does not compel" that transformation. *Westwood*, 644 F.3d at 807-08 (Bybee, J., concurring).

The differences between a *newly-added* counterclaim *defendant* and an *original plaintiff* who becomes a counterclaim defendant (the situation in *Shamrock Oil*) are especially important in the CAFA context. As Judge Niemeyer explained in *Palisades*, *Shamrock Oil*'s holding was based on the interpretation of the phrase "*the* defendant" in the statute at issue there, a predecessor to the general removal statute. *Palisades*, 552 F.3d at 340 (Niemeyer, J., dissenting). Because CAFA uses expansive language of "*any* defendant," by contrast, Congress could not have meant to incorporate *Shamrock Oil*'s interpre-

tation of different language that is more restrictive. In addition, although this Court has reserved judgment on "whether * * * a presumption [against removal] is proper in mine-run diversity cases," it has underscored "that no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. And as we discuss below (at 12-17), the rule adopted by the decision below thwarts CAFA's purposes in addition to its text.

Moreover, there are substantial reasons for this Court to curtail the application of *Shamrock Oil* to newly-added counterclaim defendants of *any* kind. Unlike the original plaintiff in *Shamrock Oil*, an added counterclaim defendant has *not* chosen the state forum, and is a full-blown defendant in every legal and practical sense—save (under the reasoning of the decision below and similar decisions) the right of removal to federal court.

As one court noted in (reluctantly) remanding a non-class action removed by an added counterclaim defendant, "[i]t is by no means clear that the prohibition against removal by additional counterclaim defendants is sensible or entirely fair." *Bank of N.Y. Mellon* v. *Cioffi*, 2016 WL 3962818, at *7 (D. Mass. July 21, 2016). That court continued: "Such a defendant, unlike an original plaintiff/counterclaim defendant, did not select the forum. Other types of defendants, such as an original defendant or a defendant added by plaintiff's amendment, have an opportunity to remove to a federal forum. It is at the very least illogical to deny that opportunity to an additional counterclaim defendant." *Ibid.* And the court further observed that "[a]n additional counterclaim defendant has been sued in the only meaningful sense of the word—he has been hauled into court in-

voluntarily and must defend an action for relief against him." *Id.* at *8 (quotation marks omitted).

B. The decision below frustrates CAFA's essential purpose of ensuring federal jurisdiction over interstate class actions.

Congress enacted CAFA in response to a decade's worth of "abuses of the class action device" by plaintiffs' lawyers (CAFA § 2(a)(2) (28 U.S.C. § 1711 note))—including the filing of important interstate class actions in state court. As this Court has recognized, the statute's "primary objective" is thus to "ensur[e] Federal court consideration of interstate cases of national importance." *Standard Fire*, 133 S. Ct. at 1350 (quotation marks omitted). That is why, as noted above, this Court has held that "no antiremoval presumption attends cases invoking CAFA." *Dart Cherokee*, 135 S. Ct. at 554. On the contrary: "CAFA's provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Ibid.* (quotation marks omitted).

As the petition persuasively details (at 16-22), the decision below—and similar decisions from the Sixth, Seventh, and Ninth Circuits—cannot be squared with this Court's directive to interpret CAFA's provisions broadly and in favor of removal.

1. The text of CAFA sets forth the "finding[]" of Congress that "there have been abuses of the class action device" that have "undermine[d] the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction," in that class-action counsel have been "keeping cases of na-

tional importance out of Federal court." CAFA §§ 2(a)(2), 2(a)(4)(A) (28 U.S.C. § 1711 note). Consistent with that finding, one of the legislative "purposes" set forth in the statute is to "provid[e] for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2) (28 U.S.C. § 1711 note); accord *Standard Fire*, 133 S. Ct. at 1350.

The Senate Judiciary Committee's Report includes more detailed findings. The Report observes that prior law enabled lawyers to "'game' the procedural rules" by "manipulat[ing] their pleadings" to keep class actions in state court—for example, by adding parties to defeat complete diversity or alleging that no individual class member was seeking damages above the jurisdictional threshold. S. REP. NO. 109-14, at 4, 26. The Report explains that CAFA addresses these problems by amending the law to ensure that interstate class actions can be litigated in "the proper forum—the federal courts," where the Committee "firmly believes" such actions belong. *Id.* at 5.

While CAFA was being debated, virtually every sponsor of the legislation—in both Houses, and of both parties—expressed the same view.[4] And the

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[4] See, *e.g.*, 151 CONG. REC. S1086-02, 1099 (daily ed. Feb. 8, 2005) (statement of Sen. Kohl) ("Our bill attempts to * * * ensure that cases with a national scope are heard in Federal court."); *id.* at 1105 (statement of Sen. Grassley) ("[CAFA] will allow nationwide class actions to be heard in a proper forum, the Federal courts."); 151 CONG. REC. H723-01, 726 (daily ed. Feb. 17, 2005) (statement of Rep. Sensenbrenner) ("The bill before the House today offers commonsense procedural changes that will end the most serious abuses by allowing more interstate class actions to be heard in Federal courts.").

President made a similar point when he signed the Act into law.[5]

2. Congress enacted CAFA to prevent precisely the type of situation that the decision below permits, indeed encourages.

There is no dispute that the putative class action here satisfies CAFA's jurisdictional requirements (*i.e.*, minimal diversity and an amount in controversy of more than $5 million). It would therefore have been removable if it had been filed as a freestanding suit.

The consequence of the decision below is that a putative class action that seeks millions of dollars on behalf of thousands of class members may be removed if it is pleaded as an independent action but not, as in this case, if it is pleaded as a "counterclaim" to an individual collections suit brought by a different party. Congress could not have intended to enable plaintiffs' lawyers to circumvent CAFA through the simple expedient of recruiting a defendant in a state-court action to serve as a "counterclaim plaintiff" in an otherwise-removable class action, or even deliberately provoking a simple collection action as a pretext to launch such a class-wide claim. And courts should not "interpret[] th[e] Act as containing a loophole that Congress could not have intended to create." *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 239 (1996) (Breyer, J., concurring in the judgment).

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[5] See Remarks on Signing the Class Action Fairness Act of 2005, 41 WEEKLY COMP. PRES. DOC. 265, 266 (Feb. 18, 2005) ("[CAFA] moves most large, interstate class actions into Federal courts. This will prevent trial lawyers from shopping around for friendly local venues.").

Indeed, members of this Court have recognized that CAFA cannot be read to permit similar gamesmanship. In posing a question to the respondent's counsel at oral argument in *Standard Fire*, Chief Justice Roberts identified the mischief that could occur if plaintiffs' lawyers were permitted to artificially manipulate their pleadings to circumvent CAFA—there, to avoid CAFA's $5 million amount-in-controversy requirement. He posited that a plaintiffs' lawyer might bring a "$4 million" class action in one state court on behalf of people "whose names begin with A to K" and bring another $4 million class action "in the next county" on behalf of those "whose named begin L to Z." Tr. of Oral Arg., *Standard Fire Ins. Co.* v. *Knowles*, 2013 WL 67701, at *29 (Jan. 7, 2013). When counsel responded that such a "legal strategy is perfectly appropriate" "for federal jurisdiction purposes" (*id.* at *29-30), Justice Breyer—who ultimately authored the opinion—reacted that such strategies create "a loophole" that "swallows up all of Congress's statute" (*id.* at *30). The result, he continued, would be that "we have 30 or 40 or $50 million cases being tried in whatever counties Congress liked the least." *Id.* at *30-31.

Further, this congressional purpose of preventing plaintiffs' lawyers from undermining removal through jurisdictional manipulations appears even outside of CAFA. For example, in the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758, Congress amended 28 U.S.C. § 1446 to put a stop to manipulation of removal deadlines by plaintiffs' lawyers. The statute now gives "[e]ach defendant" the opportunity to remove within "30 days after service" on it (28 U.S.C. § 1446(b))—rather than holding all defendants, even those never or belatedly served by plaintiffs as a tac-

tical maneuver, to a single 30-day clock upon service of the first defendant.[6] And the statute also codified a "bad faith" equitable exception to the one-year bar to removal of a standard diversity case. *Id.* § 1446(c)(1).[7]

As one commentator has noted, such manipulative tactics are of a piece with "new and creative tactics" adopted by "class action plaintiffs * * * to avoid the reforms" of CAFA—including the filing of "counterclaim class action[s]." Nathan A. Lennon, *Two Steps Forward, One Step Back: Congress Has Codified The* Tedford *Exception, But Will Inconsistent Applications Of "Bad Faith" Swallow The Rule?*, 40 N. Ky. L. Rev. 233, 237-38 (2013). And even an academic advocate of the counterclaim-class-action tactic acknowledges that the choice between filing a qualifying class action as an independent suit and filing it as a counterclaim depends upon whether class counsel "wishes to litigate in federal or state court." Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 197 (2007).

But the whole point of CAFA is that it is the class-action *defendant* that gets to decide whether to litigate a qualifying case in federal or state court. This Court's review is therefore essential to correct lower courts' narrow reading of CAFA that, if allowed to stand, would permit plaintiffs' lawyers to

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[6] This amendment makes clear that Congress intended for each defendant newly haled into court to have its own opportunity to remove, even outside the CAFA context.

[7] That one-year limitation does not apply to CAFA cases. See 28 U.S.C. § 1453(b).

litigate interstate class actions in state court—contrary to CAFA's primary purpose of "ensuring Federal court consideration of interstate cases of national importance." *Standard Fire*, 133 S. Ct. at 1350 (quotation marks omitted).

* * *

In short, the text and purposes of CAFA—as well as the practical reasons why a newly-added counterclaim defendant should be treated like "any [other] defendant" for purposes of CAFA removal under Section 1453—warrant this Court's correction of "a clear misreading by the lower courts of [this] *** important federal statute." *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 5 (1991).

II. The Question Presented Is A Recurring One Of Exceptional Importance.

The question presented is important for the same reasons that the decision below is wrong: its interpretation undermines both CAFA's text and basic purpose. By allowing plaintiffs' lawyers to manipulate their pleadings to keep class actions in state court, the Fourth Circuit's decision has further ratified the very tactic that CAFA was enacted to prevent. CAFA has been described as "the most significant legislative reform of complex litigation in American history." Hoffman, *supra*, at 410. CAFA has also been described more generally as "arguably the most important tort reform in recent years." Anthony J. Sebok, *What Do We Talk About When We Talk About Mass Torts?*, 106 Mich. L. Rev. 1213, 1216 n.14 (2008).

Moreover, recent years have borne out the prediction of the academic proponent of such actions that the handful of cases brought prior to *Palisades*

were "just the tip of an approaching iceberg." *Tidmarsh, supra*, at 199; see also Don Zupanec, *Palisades Collections LLC* v. *Shorts*, 24 FED. LITIGATOR 7 (Feb. 2009) (describing the use of counterclaim class actions as "an increasingly frequent scenario"). As the petition points out, the same tactic employed in this case has been replicated in numerous other recent cases—with the petition listing over half a dozen examples from just the last *nine months*. Pet. 23-24 & n.*. And a brief, informal inquiry of PLAC's members has yielded several additional examples of counterclaim class actions. See, *e.g.*, Answer and Counterclaim, *St. Vincent Charity* v. *Paluscsak*, No. 17CVF09866 (Ohio Cleveland Municipal Court, filed Aug. 14, 2017); *Manahawkin Convalescent* v. *O'Neill*, 43 A.3d 1197 (N.J. Super. Ct. App. Div. 2012); Answer and Counterclaim, *Portfolio Recovery Assocs., LLC* v. *Houston*, No. 12-CVD-642 (N.C. Gen. Ct. of Justice, Iredell County, filed May 14, 2012); *Ford Motor Credit Co.* v. *Calandra*, 2011 WL 2566076 (N.J. Super. Ct. App. Div. June 30, 2011); *United Consumer Fin. Servs. Co.* v. *Carbo*, 982 A.2d 7 (N.J. Super. Ct. App. Div. 2009).[8]

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[8] For still more examples, see also, *e.g.*, *Unifund CCR Partners* v. *Harrell*, 509 S.W.3d 25 (Ky. 2017); *Midland Funding LLC* v. *Hilliker*, 68 N.E.3d 542 (Ill. App. 2016); *Cach, LLC* v. *Echols*, 506 S.W.3d 217 (Ark. 2016); *Portfolio Recovery Associates, LLC* v. *Dixon*, 366 P.3d 245 (Kan. App. 2016); *Citibank, N.A.* v. *Perry*, 2016 WL 6677944 (W.Va. Nov. 10, 2016); *Taylor* v. *First Resolution Invest. Corp.*, 72 N.E.3d 573 (Ohio 2016); *HBSC Bank USA, N.A.* v. *Arnett*, 767 F. Supp. 2d 827 (N.D. Ohio 2011); *Liberty Credit Servs.* v. *Yonker*, 2010 WL 2639903 (N.D. Ohio June 29, 2010); *Citibank (South Dakota), N.A.* v. *Duncan*, 2010 WL 379869 (M.D. Ala. Jan. 25, 2010); and *Wells Fargo Bank* v. *Gilleland*, 621 F. Supp. 3d 545 (N.D. Ohio 2009).

The prevalence of counterclaim class actions like this one is unsurprising. As a practical matter, plaintiffs' attorneys will have little trouble finding debt collection proceedings or other small-scale litigation to serve as a vehicle for bringing such cases. Indeed, if need be, plaintiffs' attorneys could simply engineer the requisite initial proceeding by, for example, having a potential counterclaim plaintiff located in a "magnet" state court jurisdiction fail to pay certain bills and thus provoke a collections action. Bolstered by decisions like the one below and publications advertising the practice, plaintiffs' attorneys have ample opportunity to "avoid the reforms" of CAFA by filing "counterclaim class actions." Lennon, *supra*, at 237-38; Tidmarsh, *supra*, at 197-99.

The harms presented by these counterclaim class actions are compounded by the inevitability of coerced settlements following class certification in state court, which is precisely what CAFA was enacted to prevent. The legislative history shows that Congress was concerned about the "common abuse" by plaintiffs' lawyers of filing meritless class actions in state court "as 'judicial blackmail'" to extract sizable settlements from corporate defendants. S. REP. NO. 109-14, at 20; see also *id.* at 21 ("Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions."). And the Report echoed Judge Posner's sentiment that certification of a class action in even meritless cases places defendants "'under intense pressure to settle,'" because "'certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury

trial.'" *Id.* at 21 (quoting *In re Rhone-Poulec Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995)).[9]

In other words, class certification is often the main event in a putative class-action case, and Congress enacted CAFA specifically to allow defendants to avoid the lax certification standards employed by some state courts. Congress found that state-court judges frequently apply procedural rules "in a manner that contravenes basic fairness" (S. REP. NO. 109-14, at 4); class-action lawyers often "effectively control the litigation" in state court (*ibid.*); and state courts sometimes "act[] in ways that demonstrate bias against out-of-State defendants" (CAFA § 2(a)(4) (28 U.S.C. § 1711 note)).

Finally, even apart from the growing number of cases in which the question presented arises, the issue is sufficiently important to warrant this Court's immediate intervention. By the very nature of the issue, there is a large amount of money at stake—at least $5 million (the jurisdictional threshold) in every case—and, as just discussed, there is generally a higher probability of coercive settlement when a case remains in state court. "Th[e] enormous potential liability, which turns on a question of federal statutory

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[9] See also, *e.g.*, *Epic Sys. Corp.* v. *Lewis*, --- S. Ct. ----, 2018 WL 2292444, at *16 (May 21, 2018) (observing that it is "well known" that class actions "can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims'" if a class is certified) (alteration in original; quoting *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting)); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial.").

interpretation, is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Trust* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., joined by Alito, J., concurring).

III. This Court's Review Is Essential Because Only This Court Can Clarify The Limits Of Its Holding In *Shamrock Oil*.

Finally, as the petition explains, this Court's review is essential because the lower courts have misconstrued CAFA precisely because they have felt compelled by this Court's opinion in *Shamrock Oil*. This Court alone has the power to clarify the much-needed limits on that decision's reach. See Pet. 10-16. Cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 278 (2002) (granting review in part to "resolve any ambiguity in [this Court's] own opinions"); *Arkansas* v. *Sanders*, 442 U.S. 753, 754 (1979) (granting review "to resolve some apparent misunderstanding as to the application of" a prior decision of this Court), abrogated by *California* v. *Acevedo*, 500 U.S. 565 (1991).

For example, although he disagreed with the *Palisades* majority's extension of *Shamrock Oil* to the CAFA context, Judge Niemeyer also noted in his opinion dissenting from the denial of rehearing en banc in that case that "only the Supreme Court" has the power to "rectify" lower courts' erroneous interpretation of *Shamrock Oil* (and therefore CAFA as well). 552 F.3d at 345. Similarly, in rejecting the argument that this Court's opinion in *Dart Cherokee* undermined the extension of *Shamrock Oil* into the CAFA context, the Seventh Circuit remarked that "[i]f that is where the Supreme Court is going, it will have to get there on its own; it is not for us to antici-

pate such a move." *Tri-State Water Treatment*, 845 F.3d at 356; accord Pet. App. 11a (quoting same).

Accordingly, a conflict among the circuits is not likely to develop. This Court should grant the petition and take up these invitations to clarify the scope of *Shamrock Oil* in order to fix the "unfortunate loophole in the Class Action Fairness Act" that has resulted from lower courts' expansive misinterpretation of that decision's reach. *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc).

* * *

In short, review is plainly warranted here. The lower courts' erroneous reading of a Supreme Court decision has led to the weakening of an important federal statute that threatens nationwide harm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2018

No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Retail Litigation Center, Inc. ("RLC") is a 501(c)(6) membership association that has no parent company. No publicly held company owns a ten percent or greater ownership interest in RLC.

The Chamber of Commerce of the United States of America ("Chamber") is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTEREST OF THE *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC"), *amicus*, represents national and regional retailers, including many of the country's largest and most innovative retailers. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases.

The Chamber of Commerce of the United States of America ("Chamber"), *amicus*, is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. The Chamber advocates for its members' interests before Congress, the executive branch, and the courts, and it regularly files *amicus* briefs in cases raising issues of vital importance to the business community.

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[1] On May 14, 2018, RLC notified the parties of its intention to file this brief and both parties have consented to the filing of this brief. On May 25, 2018, *Amici* notified the parties that the Chamber would be joining this *amicus* brief. *Amici* affirm that no counsel for a party wrote this brief in whole or in part, and no counsel or party, or any other person other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the brief's preparation or submission.

This is such a case. *Amici*'s members frequently find themselves targets of large interstate class action lawsuits. They have a keen interest in ensuring that the rules governing removal of class actions to federal court are applied fairly.

In enacting the Class Action Fairness Act of 2005 ("CAFA"), Congress expanded federal court jurisdiction and, critically here, made removal more broadly available. In the years since CAFA's enactment, *amici*'s members have come to rely on CAFA in general and the removal provisions in particular to avoid many of the abuses that they had seen in state court class action practices.

The ruling of the court below threatens the robust protections of CAFA. It ignores Congress' extensively-deliberated and practical legislative solution to the problem of state court class action abuses and instead applies an overly-restrictive reading of this Court's decision in *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941).

The Fourth Circuit's needlessly constrained analysis of removal law will harm businesses across the country. With little extra effort, class counsel can now file their class claims as counterclaims in their state courts of choice, with no fear of triggering CAFA's protections. Inevitably, an increasing number of *amici*'s members will be drawn into these cases trapped in the same state court systems that Congress has recognized to be unsuitable venues for the

resolution of such cases. *Amici* and their members therefore have a strong interest in this case.

SUMMARY OF ARGUMENT

When it passed in 2005, the Class Action Fairness Act promised nothing less than a wholesale reform of the class action litigation system in the United States. Congress crafted a variety of substantive changes to eliminate the most abusive practices plaguing class actions across the country. Critically, Congress armed CAFA with procedural protections to ensure that its reforms would apply to virtually all large interstate class actions. At the heart of these procedural protections lay the reforms to the standards for removal. No longer would plaintiffs' lawyers be allowed to stack the deck in their favor by manipulating large cases into friendly state-court venues.

CAFA has lived up to its advance billing. Thanks to this innovative federal statute, many of the most egregious class action practices have been extinguished. Yet this progress is at risk, thanks to an incorrect and overly-restrictive interpretation of *Shamrock Oil*. The members of the Court who decided *Shamrock Oil* could never have foreseen either the coming rise in class actions or Congress' eight-year effort that would eventually culminate in CAFA. Nor could they have foreseen how their ruling prohibiting one type of forum shopping would be the foundation

for a renaissance in class action-related forum shopping.

This case merits review by this Court. *Amici* fully supports the legal arguments raised in the Petition. The reforms that changed the U.S. class action system were too hard-won and too important to be dismantled by the misapplication of *Shamrock Oil*. The Petition should be granted.

ARGUMENT

This Court's intervention is critical for two reasons. First, the decision below risks fundamentally undercutting the legislative scheme Congress carefully crafted in CAFA. Second, the question presented is a recurring one of exceptional importance.

I. The Decision Below Undermines Congress' Extensive Effort to Curtail Class Action Abuse in State Courts.

In 2005, our nation took an important step toward ending class action abuse with the enactment of CAFA. The preceding decade had seen an exponential increase in the number of class actions filed. By including a single plaintiff from their chosen jurisdiction, plaintiffs' lawyers were able to bring interstate class actions involving tens or even hundreds of millions of dollars in a select number of state courts that came to be known as "'magnet' jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005). These magnet

jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements that primarily benefited plaintiffs' lawyers. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions.

Since the enactment of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.), the class action system in the United States has largely moved from state courts into the federal system. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. Pa. L. Rev. 1723, 1754 (2008) (pointing to "support for the conclusion that the federal courts have seen an increase in diversity removals"); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Pa. L. Rev. 1593, 1610 (2008) ("CAFA has increased . . . the number of class action removals to federal court."). As a result of the countless hours of fact-finding, deliberation, and negotiation, Congress created a system that has succeeded in curtailing many of the worst class action abuses.

The case below, through the tactic it endorses, presents a serious threat to CAFA's protections. It endorses an end-run around CAFA's core procedural safeguards, forcing defendants to litigate massive class actions in the very same "magnet jurisdictions" that prompted Congress to enact CAFA in the first place.

Only this Court can close this loophole and protect Congress' deliberate design for safeguarding the class action system.

A. Congress Developed the Class Action Fairness Act to Address Perceived Class Action Abuses in State Courts.

In the late 1990s, in response to growing complaints about class action abuses from coast to coast, Congress began a "grinding eight-year effort" that ultimately resulted in the CAFA. Edward Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. Pa. L. Rev. 1823, 1823 (2008); *see also* S. Rep. 109-14 (2005); Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. Miami L. Rev. 385 (2005).

Passage of CAFA was no foregone conclusion. Congress had previously considered, and failed to pass, no fewer than four bills aimed at addressing concerns about class action abuses: the Interstate Class Action Jurisdiction Act of 1999, 106 Bill Tracking H.R. 1875, (passed the House but not considered by the Senate); the Class Action Fairness Act of 2002, 148 Cong. Rec. H. 847 (passed the House but not voted on by the Senate); the Class Action Fairness Act of 2003, 108 Bill Tracking H.R. 1115 (passed the House, but due to a filibuster, was not voted on by the Senate); and the Class Action Fairness Act of 2004, 108 Bill Tracking S. 2062, (stalled in the Senate, not voted on in the House). Andreeva, 59 U. Miami L. Rev. at 387-88.

Ultimately, beyond numerous committee hearings in both the House and the Senate, CAFA's passage required "multiple reports by both Houses, political compromises, two unsuccessful attempts to terminate debate in the Senate by imposing cloture on bills with bipartisan support, and strenuous efforts to amend in both the House and Senate when the bill came to the floor for a final vote." Purcell, 156 U. Pa. L. Rev. at 1823.

In enacting CAFA, Congress took note of widespread abuse of the class action device in the state courts. For example, through the "findings and purposes" section of CAFA, Congress recognized that these abuses had "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." CAFA § 2(a)(2) (codified at 28 U.S.C. § 1711 notes). Congress particularly focused on settlements that primarily enriched class counsel, but wherein "class members often receive little or no benefit from class actions and are sometimes harmed" as well as settlements that created unfair distribution among class members, and notice schemes "that prevented class members from being able to fully understand and effectively exercise their rights." CAFA § 2(a)(3) (codified at 28 U.S.C. § 1711 notes); *see also* Purcell, 156 U. Pa. L. Rev. at 1851-56; Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U.L. Rev. 729, 743-44 (2013). These are the very

abuses that corroded interstate commerce and that CAFA sought to address.

Congress also took into consideration problems highlighted by the American Bar Association Task Force on Class Action Legislation. Specifically, the Task Force highlighted the problems that arose from state courts creating rulings with a nationwide impact, despite those courts possibly having a small interest in the subject of the litigation. *See Report of the ABA Task Force on Class Action Legislation*, https://www.americanbar.org/content/dam/aba/directories/policy/2003_my_304.authcheckdam.pdf; *see also* James M. Underwood, *Rationality, Multiplicity, & Legitimacy: Federalization of the Interstate Class Action*, 46 S. Tex. L. Rev. 391, 407 (2004).

The problems inherent in a balkanized, state-court driven class action system only increased when looking beyond the four corners of any individual case. More broadly, interstate commerce suffered from the problems of overlapping class actions with the attendant risk of inconsistent results and decisions of national importance being made by local state judges. The Advisory Committee Report to the Federal Judicial Conference Committee of 2002, http://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf, emphasized this risk and reached a "unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems." Underwood, 46 S. Tex. L. Rev.

at 410, quoting Report of the Civil Rules Advisory Committee 311 (May 20, 2002), http://www.uscourts.gov/sites/default/files/fr_import/CV5-2002.pdf, (presented to the Standing Comm. on Rules of Practice and Procedure); *see also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. Rev 461, 540 (2000) (arguing for expanded removal and multidistrict transfer statutes to minimize risk of overlapping actions).

In the nine sections of CAFA, Congress created a host of protections and safeguards designed to minimize these abuses and protect the system of interstate commerce in the courts. For example, CAFA prohibits unequal treatment of class members based on their geographic location CAFA § 3(a) (codified at 28 U.S.C. § 1714); requires notification of the state Attorneys General prior to any class settlement CAFA § 3(a) (codified at 28 U.S.C. §§ 1715(b), (d)); requires improved notice to class members CAFA § 3(a) (codified at 28 U.S.C. § 1715(e)); and restricts the availability of coupon/no-cash settlements CAFA § 3(a) (codified at 28 U.S.C. § 1712). These reforms, on their own, provided powerful tools against some of the more egregious abuses. *See* Klonoff, 90 Wash. U.L. Rev. at 745.

Yet Congress had no ability to directly influence the procedures and safeguards in state court systems, the home of much of the most egregious misconduct that Congress sought to address. Congress found that state and local courts (A) kept "cases of national importance out of Federal court; (B) sometimes act[ed]

in ways that demonstrate[d] bias against out-of-State defendants; and (C) [made] judgments that impose[d] their view of the law on other States and [bound] the rights of the residents of those States." CAFA § 2(a)(4) (codified at 28 U.S.C. § 1711 notes). Congress thus stepped in to help dismantle "a system that allows state court judges to dictate national policy . . . from the local courthouse steps contrary to the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14, at 24 (2005).

With principles of federalism barring direct regulation of state court procedures, Congress chose to open the federal courthouse doors a little wider, allowing original and removal subject matter jurisdiction in class actions that would previously have been locked in state court. Specifically, CAFA amended 28 U.S.C. § 1332 to create original and removal jurisdiction in federal courts of any class with 100 or more members if "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." CAFA, § 4, (codified at 28 U.S.C. § 1332(d)). This $5,000,000 minimum may be satisfied by aggregating the value of class members' claims, regardless of whether any individual claim would independently satisfy the $75,000 amount in controversy in the diversity statute. *See generally* 28 U.S.C. § 1332. Finally, the statute relaxed the complete diversity requirement in favor of a "minimal diversity" standard that requires only that one plaintiff and one defendant be citizens of different

states. CAFA, § 4 (codified at 28 U.S.C. § 1332(d)); *see generally* Andreeva, 59 Miami L. Rev. at 388-92.

These changes alone were insufficient, however, if class actions remained in state courts due to the restrictive removal procedures of 28 U.S.C. § 1441. Prior to CAFA, the applicable "law enable[d] plaintiffs' lawyers who prefer[red] to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14, at 10 (2005).

To address this, Congress enacted, through CAFA, a more permissive removal system. *See* Lee & Willging, 156 U. Pa. L. Rev. at 1738. First, it allowed the removal of class action suits by "any defendant." CAFA, § 5 (codified at 28 U.S.C. § 1453(b)). Second, it permitted removal even if one of the defendants is a citizen of the state in which the action was brought. *Id.* Third, it eliminated the one-year deadline for removal for cases removed under CAFA. *Id.* And finally, it expanded the ability of defendants to obtain an expedited appeal of a remand order. *Id.* (codified at 28 U.S.C. § 1453(c)); *see also* Lee & Willging, 156 U. Pa. L. Rev. at 1738. To ensure that the intent of CAFA was met, House Judiciary Committee Chairman James Sensenbrenner noted that if "a Federal court is uncertain . . . [that] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec. H726 (daily ed. Feb. 17, 2005) (Statement of Rep. Sensenbrenner).

This Court recognized this Congressional intent in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014), stating that CAFA's "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." Just as importantly, the Court noted that "CAFA's primary objective" was "ensur[ing] Federal court consideration of interstate cases of national importance." *Id.* The Court unequivocally announced that "no antiremoval presumption attends cases invoking CAFA." *Id.*

Put together, these changes in the applicable jurisdiction and removal statutes gave CAFA its power. "The main point of CAFA was to permit defendants to remove large-scale class action litigation from plaintiff-favored state courts to federal courts. The data suggest that it is doing exactly that, as federal courts have experienced a significant upswing in class actions since CAFA's enactment." Erichson, 156 U. Pa. L. Rev. at 1607. To the extent a class action litigant prefers federal over state court, "CAFA's impact is direct and obvious." *Id.* For example, class action filings in the Madison County, Illinois Circuit Court fell from 106 in 2003 to only 3 in 2006. *Id.* at 1609-10.

Through CAFA's one-two punch of changes to jurisdictional and removal statutes, the risk of abusive state court forum-shopping declined.

B. The Procedure Endorsed by the Ruling Below Threatens the Core Elements of Congress' CAFA Reforms.

Through the procedural technicalities countenanced by the Fourth Circuit below, as well as the Sixth, Seventh, and Ninth Circuits, class action counsel have found a relatively simple solution around CAFA's protections. *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.) (prohibiting removal of class action counterclaim by third party counterclaim defendant), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012) (same); *Westwood Apex v. Contreras*, 644 F.3d 799, 804-05 (9th Cir. 2011) (same); *Palisades Collection LLC v. Shorts*, 552 F.3d 327, 334-35 & n.4 (4th Cir. 2008) (same).

The case below illustrates the archetypal mechanism that class counsel are now using to avoid the safeguards Congress constructed through CAFA. A consumer purchased an item, here a water-treatment system, on credit and then failed to make payments. Pet. App. 2a–3a. When the consumer was sued in a simple collection action, the consumer asserted a class action counterclaim against the original plaintiff and, importantly, two third parties. Pet. App. 2a. Relying on the "original defendant" rule in *Shamrock Oil*, 313 U.S. at 108-09, the class action plaintiff managed to defeat the removal attempt. Pet. App. At 9a–11a.

There is no dispute that CAFA would apply if the consumer had filed that class action counterclaim as a standalone complaint. The case would be removable, and all of CAFA's protections, designed by Congress over eight long years of bruising battles, would be triggered. But thanks to the procedural hook created in the collection action, the class plaintiff here has found a CAFA antidote—a seventy-seven year old case that spoke neither of class actions nor of third party defendants, *Shamrock Oil*, 313 U.S. at 106-09.

As the Petition explains (Pet. 12-16), *Shamrock Oil* was based on the foundational principle that a plaintiff who picked one forum, the state court, should not be permitted to remove its own matter simply by virtue of being later named as a counterclaim defendant. *Shamrock Oil*, 313 U.S. at 107-08. At its heart, *Shamrock Oil* stands as a limit on plaintiff forum-shopping. The plaintiff must "abide his selection of a forum," regardless of whether he is later sued by the original defendant. *Id.* at 106 n.2, 107.

It is no small irony, then, that the anti-forum shopping *Shamrock Oil* is, today, the chief weapon for defeating CAFA, the strongest anti-forum shopping statute ever issued by Congress in the class context.

Like the Sixth, Seventh, and Ninth Circuits, the Fourth Circuit in the decision below read *Shamrock Oil* to exclude counterclaim defendants who were not original plaintiffs from the scope of the general removal statute. *See* Pet. App. 9a ("We hold that the Supreme Court has not called into question *Palisades*'s

conclusion that an additional counter-defendant is not entitled to remove under § 1441(a) or § 1453(b), nor has it abandoned *Shamrock Oil*'s definition of 'defendant' in the class action context."); *Tri-State Water Treatment*, 845 F.3d at 354 ("All we know from *Shamrock Oil* is that removal is not available for a plaintiff who is a counterclaim-defendant. Both the Supreme Court and Congress have left *Shamrock Oil* undisturbed during the ensuing 75 years."); *In re Mortg. Elec. Registration Sys.*, 680 F.3d at 853 (citing *Shamrock Oil* for the proposition that "a counterclaim or third-party defendant is not a 'defendant' who may remove the action to federal court"); *Westwood Apex*, 644 F.3d at 804 ("Since the Supreme Court's decision in *Shamrock Oil* ... 'defendant' for purposes of designating which parties may remove a case under § 1441 has been limited by a majority of the courts to mean only 'original' or 'true' defendants; 'defendant' in Chapter 89, thereby, excludes plaintiffs and non-plaintiff parties who become defendants through a counterclaim."); *Palisades*, 552 F.3d at 332 ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants.").

This method of analysis ignores both *Shamrock Oil*'s procedural context and CAFA's comprehensive legislative scheme. It is clear that these circuits believe themselves constrained by the wording of *Shamrock Oil*'s holding. If so, only this Court is in a position to course-correct. *Shamrock Oil* requires a claimant to abide his choice of a forum; it does not

permit counterclaim defendants to trap unwilling third party defendants in state court.

II. The Question Presented is a Recurring One of Exceptional Importance.

The procedural posture of the case below is no procedural fluke. It is part of a growing trend of cases that are incorporating the class action counterclaim. *See, e.g., Bank of N.Y. Mellon v. Cioffi*, No. 15-13935, 2016 U.S. Dist. LEXIS 95474 (D. Mass. July 21, 2016); *Ford Motor Credit Co. v. Jones*, No. 1:07-cv-728, 2007 U.S. Dist. LEXIS 55336 (N.D. Ohio July 31, 2007); *Citifinancial, Inc. v. Lightner*, No. 5:06-cv-145, 2007 U.S. Dist. LEXIS 41338 (N.D. W. Va. June 6, 2007); *Unifund CCR Partners v. Wallis*, Nos. 06-CV-545, 06-CV-546, 06-CV-547, 2006 U.S. Dist. LEXIS 17989 (D. S.C. Apr. 7, 2006); *Williamsburg Plantation, Inc. v. Bluegreen Corp*, 478 F. Supp. 2d 861 (E.D. Va. 2006); *Unifund CCR Partners v. Harrell*, 509 S.W.3d 25 (Ky. 2017); *Taylor v. First Resolution Investment Corp.*, 72 N.E.3d 573 (Ohio 2016); *Cach, LLC v. Echols*, 506 S.W.3d 217 (Ark. 2016); *Citibank, N.A. v. Perry*, 797 S.E.2d 803 (W. Va. 2016); *Midland Funding LLC v. Hiliker*, 68 N.E.3d 542 (Ill. App. 2016); *Portfolio Recovery Associates, LLC v. Dixon*, 366 P.3d 245 (Kan. App. 2016).

If allowed to stand, the decision below will result in enterprising plaintiffs' counsel inviting small claims lawsuits, then converting the defendant into a counterclaim plaintiff, forcing defendants to litigate matters of nationwide importance in the very "magnet"

jurisdictions that were the source of the problems that led to the passage of CAFA.

Any plaintiff's counsel who is unclear what to do can find a road map from the consultant who advised the collection-action defendant in *Palisades*, 552 F.3d at 329-30. *See* Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 240 (2007) (laying out framework for adjudication of counterclaim class actions in state court and stating that the "Article has shown that the eulogy for state-court class-action practice is a bit premature"). The counterclaim class action is nothing short of a full assault on the protections of CAFA.

This is a significant problem for businesses and consumers alike. CAFA has been making slow—but steady—progress and has, in turn, reduced the burdens that class action abuse imposes on the national economy. If the Fourth Circuit's decision is allowed to stand, however, plaintiffs' lawyers will be able to evade CAFA and trap these cases in the many "magnet jurisdictions" for abusive class actions. *Amici* respectfully requests that this Court step in and foreclose this judicial erosion of the class action standards Congress enacted in CAFA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 25, 2018

No. 17-1471

IN THE
Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED APRIL 23, 2018
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Citibank, N.A. Complaint (N.C. Dist. Ct. June 9, 2016) JA12

Mr. Jackson Summons and Answer, Affirmative Defenses, Counterclaim, and Third-Party Class Action Claims (N.C. Dist. Ct. Aug. 26, 2016) JA16

Citibank, N.A. Notice of Voluntary Dismissal Without Prejudice (N.C. Dist. Ct. Sept. 23, 2016) JA41

Home Depot U.S.A., Inc. Notice of Removal, Doc. 1 (W.D.N.C. Oct. 12, 2016) JA42

Mr. Jackson Motion to Remand, Doc. 23 (W.D.N.C. Nov. 8, 2016) JA51

Mr. Jackson Amended Third-Party Class Action Claims, Doc. 30 (W.D.N.C. Nov. 18, 2016) JA53

Home Depot U.S.A., Inc. Memorandum of Law in Support of Motion to Dismiss in Favor of Arbitration, Doc. 33 (W.D.N.C. Dec. 2, 2016) JA69

Mr. Jackson Opposition to Motion to Dismiss in Favor of Arbitration, Doc. 35 (W.D.N.C. Dec. 14, 2016) JA87

Home Depot U.S.A., Inc. Reply Memorandum of Law in Further Support of Motion to Dismiss, Doc. 40 (W.D.N.C. Jan. 11, 2017) JA121

Order Granting Permission to Appeal, Doc. 18 (4th Cir. Jan. 22, 2018) JA144

The following decisions have been omitted in printing the joint appendix because they appear in the appendix to the petition for a writ of certiorari, beginning on the following pages:

Opinion of the Court of Appeals (4th Cir. 2018) 1a

Opinion of the District Court (W.D.N.C. 2017) 16a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 17-1627

GEORGE W. JACKSON,
Third-Party Plaintiff – Appellee,

v.

HOME DEPOT U.S.A., INC.,
Third-Party Defendant – Appellant,

and

CAROLINA WATER SYSTEMS, INC.; CITIBANK, N.A.,
Defendants.

DOCKET ENTRIES

DATE	#	DOCKET TEXT
05/17/2017	1	Case docketed. Originating case number: 3:16-cv-00712-GCM. Case manager: KStump. [17-1627] KS [Entered: 05/17/2017 08:57 AM]
		* * *
06/26/2017	3	BRIEF by Appellant Home Depot U.S.A., Incorporated in electronic and paper format. Type of Brief: OPENING. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/26/2017. [1000107490] [17-1627] Antonio Lewis [Entered: 06/26/2017 05:18 PM]
06/26/2017	4	Joint FULL ELECTRONIC APPENDIX and full paper appendix by Appellant Home Depot U.S.A., Incorporated.

DATE	#	DOCKET TEXT
		Method of Filing Paper Copies: courier. Date paper copies mailed dispatched or delivered to court: 06/26/2017. [1000107499] [17-1627] Antonio Lewis [Entered: 06/26/2017 05:33 PM]
		* * *
07/26/2017	7	BRIEF by Appellee George W. Jackson in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/26/2017. [1000125908] [17-1627]--[Edited 07/26/2017 by MFT] Daniel Bryson [Entered: 07/26/2017 01:27 PM]
		* * *
08/10/2017	9	BRIEF by Appellant Home Depot U.S.A., Incorporated in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/09/2017. [1000134483] [17-1627] Antonio Lewis [Entered: 08/10/2017 10:55 AM]
		* * *
12/05/2017	18	ORAL ARGUMENT heard before the Honorable Paul V. Niemeyer, Dennis W. Shedd and Allyson K. Duncan. Attorneys arguing case: Mr. Sidney Stewart Haskins, II for Appellant Home Depot U.S.A.,

DATE	#	DOCKET TEXT
		Incorporated and David Kevin Lietz for Appellee George W. Jackson. Courtroom Deputy: Anisha Walker. [1000203580] [17-1627] AW [Entered: 12/05/2017 01:02 PM]
01/22/2018	19	PUBLISHED AUTHORED OPINION filed. Originating case number: 3:16-cv-00712-GCM [1000227214]. [17-1627] KS [Entered: 01/22/2018 11:48 AM]
01/22/2018	20	JUDGMENT ORDER filed. Disposition method: 17-1627 opn.p.arg. Decision: Affirmed. Originating case number: 3:16-cv-00712-GCM. Entered on Docket Date: 01/22/2018. [1000227219] Copies to all parties and the district court/agency. [17-1627] KS [Entered: 01/22/2018 11:51 AM]

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Docket No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

DOCKET ENTRIES

DATE	#	DOCKET TEXT
10/12/2016	1	NOTICE OF REMOVAL with Jury Demand from General Court of Justice, District Court Division, Mecklenburg County, case number 16 CVD 10961. (Filing fee $ 400 receipt number 0419-3131490), filed by Home Depot U.S.A., Inc.. (Attachments: # 1 Exhibit A - Summons and Complaint, # 2 Exhibit B - Documents served on Home Depot U.S.A., Inc., # 3 Exhibit C - Citibank Dismissal, # 4 Cover Sheet Civil Cover Sheet)(Guidry, David) (Entered: 10/12/2016)

* * *

DATE	#	DOCKET TEXT
10/12/2016		ANSWER to Complaint contained in 1 Notice of Removal. THIRD PARTY COMPLAINT against Home Depot U.S.A., Inc., Carolina Water Systems, Inc. COUNTERCLAIM against Citibank, N.A. by George W Jackson. (Contained in State Court Pleadings - See Document No 1 Exhibit A) (tmg) (Entered: 10/14/2016)
		* * *
10/28/2016	11	MOTION to Compel Individual Arbitration, MOTION to Dismiss Jackson's Counterclaim or, in the Alternative, to Stay Proceedings as to Jackson's Counterclaim by Citibank, N.A.. Responses due by 11/17/2016 (Raynal, Charles) (Entered: 10/28/2016)
		* * *
10/28/2016	14	MOTION Realign the Parties by Home Depot U.S.A., Inc.. Responses due by 11/17/2016 (Attachments: # 1 Proposed Order)(Guidry, David) (Entered: 10/28/2016)
		* * *
10/28/2016	16	MOTION to Dismiss and Incorporated Memorandum of Law in Support Thereof by Carolina Water Systems, Inc.. Responses due by 11/17/2016 (Attachments: # 1 Exhibit 1 - Blum Decl. re: (A)

DATE	#	DOCKET TEXT
		Purchase Agreement) (Terpening, William) (Entered: 10/28/2016)
10/28/2016	17	MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. Responses due by 11/17/2016 (Guidry, David) (Entered: 10/28/2016)
		* * *
11/08/2016	23	MOTION to Remand by George W. Jackson. Responses due by 11/28/2016 (Attachments: # 1 Proposed Order, # 2 Certificate of Compliance)(Bryson, Daniel) (Entered: 11/08/2016)
		* * *
11/14/2016	27	MEMORANDUM in Opposition re 14 MOTION Realign the Parties by George W. Jackson. Replies due by 11/28/2016 (Attachments: # 1 Exhibit A - Citibank Notice of Vol Dismissal wo Prej)(Bryson, Daniel) (Entered: 11/14/2016)
		* * *
11/18/2016	30	Amended THIRD-PARTY COMPLAINT against Carolina Water Systems, Inc., Home Depot U.S.A., Inc., filed by George W. Jackson. (Attachments: # 1 Exhibit A - Home Improvement Agreement)(Bryson, Daniel) Modified text on 11/21/2016 (tmg). (Entered: 11/18/2016)

DATE	#	DOCKET TEXT
12/02/2016	31	ANSWER to 30 Counterclaim by Carolina Water Systems, Inc..(Terpening, William) (Entered: 12/02/2016)
12/02/2016	32	MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. Responses due by 12/16/2016 plus an additional 3 days if served by mail (Guidry, David) (Entered: 12/02/2016)
12/02/2016	33	MEMORANDUM in Support re 32 MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. (Guidry, David) (Entered: 12/02/2016)
12/14/2016	34	MEMORANDUM in Opposition re 16 MOTION to Dismiss and Incorporated Memorandum of Law in Support Thereof by George W. Jackson. Replies due by 12/21/2016 plus an additional 3 days if served by mail (Bryson, Daniel) (Entered: 12/14/2016)
12/14/2016	35	MEMORANDUM in Opposition re 32 MOTION to Dismiss in Favor of Arbitration by George W. Jackson. Replies due by 12/21/2016 plus an additional 3 days if served by mail (Bryson, Daniel) (Entered: 12/14/2016)
12/14/2016	36	RESPONSE to Motion re 23 MOTION to Remand by Home Depot U.S.A., Inc.. Replies due by 12/21/2016 plus an additional 3

DATE	#	DOCKET TEXT
		days if served by mail (Attachments: # 1 Exhibit A - Home Depot's Responses to Interrogatories, # 2 Exhibit B - John Blum Declaration)(Guidry, David) (Entered: 12/14/2016)
12/14/2016	37	REPLY to Response to Motion re 14 MOTION Realign the Parties by Home Depot U.S.A., Inc.. (Guidry, David) (Entered: 12/14/2016)
01/11/2017	38	REPLY to Response to Motion re 23 MOTION to Remand by George W. Jackson. (Attachments: # 1 Exhibit A - Bauer v. Home Depot)(Bryson, Daniel) (Entered: 01/11/2017)
01/11/2017	39	REPLY to Response to Motion re 16 MOTION to Dismiss and Incorporated Memorandum of Law in Support Thereof by Carolina Water Systems, Inc.. (Terpening, William) (Entered: 01/11/2017)
01/11/2017	40	REPLY to Response to Motion re 32 MOTION to Dismiss in Favor of Arbitration by Home Depot U.S.A., Inc.. (Attachments: # 1 Exhibit C - Plaintiff's First Request for Production of Documents to Home Depot)(Guidry, David) (Entered: 01/11/2017)

* * *

DATE	#	DOCKET TEXT
03/21/2017	44	**ORDER granting 23 Motion to Remand, and this case is remanded to the Superior Court of Mecklenburg County; denying without prejudice 32 Motion to Dismiss; denying without prejudice 11 Motion to Compel; denying without prejudice 11 Motion to Dismiss; denying 14 Motion Realign the Parties; denying without prejudice 16 Motion to Dismiss; denying without prejudice 17 Motion to Dismiss. Signed by Senior Judge Graham Mullen on 3/21/2017. (eef)** (Entered: 03/21/2017)
04/03/2017	47	4th Circuit NOTICE regarding: Filing of Home Depot U.S.A. Inc.'s Petition for Permission to Appeal, Part 1 of 4. (Attachments: # 1 Part 2 of 4, # 2 Part 3 of 4, # 3 Part 4 of 4, # 4 USCA Case Number [17-184] for Petition for Permission to Appeal, USCA Case Manager Karen Stump.) (ni) (Entered: 04/04/2017)
		* * *
05/22/2017	55	USCA Case Number 17-1627 re: 47 4th Circuit Notice of Home Depot U.S.A. Inc.'s Petition for Permission to Appeal. USCA Case

DATE	#	DOCKET TEXT
		Manager Karen Stump. (ni) (Entered: 05/22/2017)
		* * *
01/22/2018	58	4th Circuit ORDER granting Home Depot USA Inc's 47 Petition for Permission to Appeal. [17-184] (ni) (Entered: 01/22/2018)
		* * *
01/22/2018	60	Published Opinion from Fourth Circuit Court of Appeals as to 47 Petition for Permission to Appeal and 58 Order Granting Permission to Appeal. 4th Circuit decision - Affirmed. (Attachments: # 1 USCA Judgment) [17-1627] [17-184(L)] (ni) (Entered: 01/22/2018)
		* * *

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

DOCKET ENTRIES

PLDG	TYPE	CLK DT	BY PARTY	AGAINST PARTY
COMP	ACCT	061716	CITIBANK NA	JACKSON, GEORGE W
CTCL	OTHR	082616	JACKSON, GEORGE W	CITIBANK NA
TPCL	DECL	082616	JACKSON, GEORGE W	HOME DEPOT USA INC CAROLINA WATER SYST
		* * *		
FILN	OTHR	101316	HOME DEPOT USA INC	
		* * *		

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
STATE OF NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

COMPLAINT
(ACCT)

NOW COMES Plaintiff, complaining of the Defendant, alleges and says as follows:

PARTIES AND JURISDICTION

1. That Plaintiff is a national banking association organized pursuant to the Laws of the United States of America with its principal place of business in the State of South Dakota.

2. That Plaintiff is informed and believes and therefore alleges that Defendant is a citizen and resident of Mecklenburg County, North Carolina, and is of a legal age and under no legal disability.

3. This cause of action arises from a credit agreement between the Parties.

4. The District Court of MECKLENBURG County, North Carolina, has jurisdiction of the parties and the subject matter of this cause of action.

FIRST CLAIM FOR RELIEF

5. Paragraphs 1-4 are realleged and incorporated herein by reference.

6. That Defendant applied for, received, and use the The Home Depot credit card issued to the Defendant by either Plaintiff or its predecessor in interest.

7. Plaintiff is the current owner and holder of all right, title, and interest in the The Home Depot credit card account established for the Defendant.

8. The Defendant is currently indebted to the Plaintiff for charges made by the Defendant to the The Home Depot credit card account in the amount of $12,179.54 as shown by the statement of account attached hereto as "Exhibit A" and incorporated herein by reference.

9. Plaintiff has made demand upon the Defendant for payment of the outstanding balance, but the Defendant has failed and refused to pay the amount owed or any portion thereof.

10. Plaintiff is entitled to recover the amount of $12,179.54 from the Defendant.

SECOND CLAIM FOR RELIEF

11. Paragraphs 1 through 10 are realleged and incorporated by reference.

12. Pursuant to the terms and conditions of the credit card agreement, the Defendant agreed to pay the Plaintiff's reasonable attorney's fees in the event that the account was placed for collection. Pursuant to N.C.G.S. 6-21.2, the Plaintiff hereby gives notice to the Defendant that it intends to enforce those provisions of the account agreement calling for the payment of attorney fees. The Plaintiff hereby further notifies the

Defendant that said Defendant may avoid the imposition of attorney fees by paying the current outstanding balance to the undersigned at the address shown below within 30 days after the Defendant has been served with a copy of this Complaint and Summons. If the Defendant pays the current outstanding balance within 30 days after service, the Plaintiff will neither seek to enforce those provisions nor pursue further legal remedies against said Defendant.

13. The Plaintiff is entitled to recover from the Defendant its attorney's fees as provided by N.C.G.S. 6-21.2.

NOTICE

14. Unless you notify the undersigned within 30 days after receiving this notice that you dispute the validity of the debt or any portion thereof, the undersigned will assume this debt is valid. If you notify the undersigned in writing within 30 days of receiving this notice, the undersigned will obtain verification of the debt or obtain a copy of the Judgment (if one has been entered) and mail you a copy of such verification or Judgment. If you so request, in writing, within 30 days after receiving this notice, the undersigned will provide you with the name and address of the original creditor, if different from the current creditor. This Notice is sent in an attempt to collect a debt and any information obtained will be used for that purpose.

WHEREFORE, Plaintiff prays the Court as follows:

1. On its First Claim for Relief, that it have Judgment against Defendant in the principal amount of $12,179.54;

2. On its Second Claim for Relief, that it have and recover of the Defendant its reasonable attorney's fees as provided by N.C.G.S. 6-21.2;

3. That the costs of this action be taxed against the Defendant; and

4. For such other and further relief as to the Court seems just and proper.

This the 9 day of June, 2016.

* * *

127816

STATE OF NORTH CAROLINA

Mecklenburg County

WAKE COUNTY SHERIFF'S DEP

16CVD10861

In The General Court Of Justice
☒ District ☐ Superior Court Division

George W. Jackson, on behalf of himself and others similarly situated,

VERSUS

Home Depot, U.S.A., Inc. and Carolina Water Systems, Inc.

CIVIL SUMMONS
THIRD PARTY

☐ THIRD PARTY ALIAS AND PLURIES SUMMONS

G.S. 1A-1, Rules 3, 4, 14

IN OUT

TO:

Home Depot U.S.A., Inc.
c/o Corporation Service Company, Registered Agent
327 Hillsborough Street
Raleigh NC 27603

TO:

Carolina Water Systems, Inc.
c/o Mark A. Tebbe, Registered Agent
PO Box 1549
Liberty NC 27298

A civil action has been commenced and the defendant in that action claims that you are or may be liable to him/her for all or part of the plaintiff's claims against him/her!

You are notified to appear and answer the third party complaint of the defendant (third party plaintiff), as follows:

1. Serve a copy of your written answer to the third party complaint of the defendant (third party plaintiff) or his/her attorney within thirty (30) days after you have been served. You may serve your answer by delivering a copy to him/her or by mailing it to his/her last known address, and
2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the third party complaint, then the defendant (third party plaintiff) will apply to the Court for the relief demanded in the third party complaint.

David K. Bryan
Whitfield Bryson & Mason LLP
900 W. Morgan Street
Raleigh NC 27603

8-26-16 2:34 ☐ PM

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

☐ ENDORSEMENT
This Third Party Summons was originally issued on the date indicated above and returned not served. At the request of the defendant (third party plaintiff), the time within which this Third Party Summons must be served is extended thirty (30) days.

☐ AM ☐ PM

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

AOC-CV-913M, Rev. 4/01
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WAKE COUNTY SHERIFF'S OFFICE

RETURN OF SERVICE

I certify that this Third Party Summons and a copy of the third party complaint were received and served as follows:

THIRD PARTY DEFENDANT 1

Date Received: 9/12/16 | Time Received: 1773 ☒ AM ☐ PM | Name of Individual, Company, Corporation, etc. to be served: HOMEDEPOT USA Inc C/O

☐ By delivering to the third party defendant named above a copy of this Third Party summons and the complaint; or

☐ By leaving a copy of this Third Party Summons and the third party complaint at the dwelling house or usual place of abode of the third party defendant named above with a person of suitable age and discretion then residing therein.

(A) As the third party defendant is a corporation, service was effected by delivering a copy of this Third Party Summons and third party complaint to the person named below.

Name and Address Of Person With Whom Copies Left (If corporation, give title of person copies left with)

Servd - Heather Hughes Agent at
320 Rodgers Dr Fl 603

☐ Other manner of service (specify)

☐ Third Party Defendant WAS NOT served for the following reason:

THIRD PARTY DEFENDANT 2

Date Received | Time Received ☐ AM ☐ PM | Name of Individual, Company, Corporation, etc. to be served

☐ By delivering to the third party defendant named above a copy of the Third Party Summons and third party complaint.

☐ By leaving a copy of this Third Party Summons and the third party complaint at the dwelling house or usual place of abode of the third party defendant named above with a person of suitable age and discretion then residing therein.

☐ As the third party defendant is a corporation, service was effected by delivering a copy of the Third Party Summons and third party complaint to the person named below.

Name and Address Of Person With Whom Copies Left (If corporation, give title of person copies left with)

☐ Other manner of service (specify)

☐ Defendant WAS NOT served for the following reason:

Service Fee: $ | Signature Of Server: 6301

Date Received: SEP 07 2016 | Name Of Server If Not Sheriff Or Deputy: DONNIE HARRISON, SHERIFF

Date Of Return: 9/12/16 | Company: WPD

AOC-CV-913M, Rev. Two, Rev. 4/01
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GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff/Counter-Defendant,

v.

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Defendant/Counter-Plaintiff.

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Counter-Plaintiff and Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIM AND THIRD-PARTY CLASS ACTION CLAIMS

JURY TRIAL DEMANDED
INJUNCTIVE RELIEF SOUGHT

ANSWER, AFFIRMATIVE DEFENSES, COUNTERCLAIM AND THIRD-PARTY CLASS ACTION CLAIMS

Defendant, George W. Jackson ("JACKSON"), by and through the undersigned counsel, files this Answer, Affirmative Defenses, and Counterclaim against CITIBANK, N.A. ("CITIBANK") and brings class action third-party claims against third-party defendants

HOME DEPOT, U.S.A., INC. ("HOME DEPOT") and CAROLINA WATER SYSTEMS, INC. ("CWS" and together with CITIBANK and HOME DEPOT, "Counterclaim and Third-Party Defendants"), as follows:

GENERAL DENIAL AND ANSWER

JACKSON generally denies each and every allegation in the Complaint that requires a response except those items specifically admitted herein. JACKSON responds to each allegation of the Complaint as follows, with numbered paragraphs corresponding to those of the Complaint.

ANSWER

1. Without knowledge, therefore Denied.

2. Admitted that JACKSON is a citizen and resident of Mecklenburg County, North Carolina, and is of a legal age and under no legal disability. Without knowledge as to CITIBANK'S beliefs.

3. Admitted for jurisdictional purposes only, otherwise Denied.

4. Admitted.

5. To the extent this paragraph requires a response, JACKSON incorporates his responses to paragraphs 1 through 4 above.

6. Admitted that as part of the sale of JACKSON's water treatment system, the sales representative arranged for financing through HOME DEPOT card services. However, in conjunction with the financing JACKSON was promised that his water treatment system would be free if he referred six customers.

7. Without knowledge, therefore denied. JACKSON demands strict proof that CITIBANK is the current owner and holder of the account at issue.

8. Denied.

9. Admitted that CITIBANK has made demand for payment, otherwise Denied.

10. Denied.

11. To the extent this paragraph requires a response, JACKSON incorporates his responses to paragraphs 1 through 10 above.

12. Denied.

13. Denied.

14. Paragraph 14 does not require a response since it is a debt collection notice provided by CITIBANK.

15. Prayer for Relief – JACKSON denies and objects to all relief sought by CITIBANK.

AFFIRMATIVE DEFENSES

1. **STANDING** – CITIBANK is barred from recovering the relief it requests since the transaction at issue is null and void pursuant to N.C. Gen. Stat. § 25A-37. Further, the Complaint fails to adequately demonstrate or incorporate the chain of title evidencing that CITIBANK is in fact the real party in interest with proper standing to bring this action.

2. **FAILURE TO STATE A CAUSE OF ACTION** – CITIBANK's claims are barred because CITIBANK has failed to satisfy the conditions precedent to stating a cause of action under the claims asserted in the Complaint, including but not limited to failure to attach any agreement it has with JACKSON, and

failure to attach any documents showing that it is the true holder of JACKSON's alleged debt.

3. **VIOLATION OF THE TRUTH IN LENDING ACT ("TILA")** – CITIBANK's claims are barred in whole or in part by the Truth in Lending Act violations that occurred at the time of the sale and financing of the water treatment system at issue. CITIBANK and its predecessors in interest failed to give JACKSON the required disclosures regarding the financing terms. For example, JACKSON did not have the opportunity to cancel the said transaction since the equipment was installed in his home on July 25, 2014, and JACKSON did not receive disclosure of the financing terms until over ten (10) days later, and even when he did receive the financing terms, they were incomplete.

4. **FRAUD** – CITIBANK's claims are barred in whole or in part by the fraud perpetrated by CITIBANK and its predecessors in interest. During the sale of JACKSON's water treatment system, JACKSON was told that he would receive his system for free after he referred six customers, in violation of North Carolina law. In addition, JACKSON was promised that he would receive promotional financing of 0% and an affordable payment that would allow him to pay off his loan, both of which were untrue. JACKSON was also subjected to numerous false representations regarding the condition of his water, special promotions and the necessity of the water treatment system, which JACKSON relied on when making the decision to purchase the product. As a result of CITIBANK's and its predecessors' fraud, including by operation of the Holder Rule, CITIBANK's claims are barred.

5. **UNCLEAN HANDS** – CITIBANK's claims are barred by the doctrine of unclean hands, because the acts alleged herein were knowing and intentional, and bar CITIBANK's recovery under any theory of relief, including relief under a purported account which was subject to a sale in violation of N.C. Gen. Stat. § 25A-37.

6. **RESERVATION OF RIGHTS** – JACKSON reserves the right to supplement these affirmative defenses as additional information becomes available through discovery.

7. **DEMAND FOR TRIAL BY JURY** – JACKSON hereby demands a trial by jury on all matters so triable as of right.

COUNTERCLAIM AND CLASS ACTION THIRD-PARTY CLAIMS

Counter-Plaintiff and Third-Party Plaintiff JACKSON, on behalf of himself and all others similarly situated, brings claims against the Counterclaim and Third-Party Defendants, as follows:

I. INTRODUCTION

1. This is a consumer class action seeking to remedy HOME DEPOT and CWS's unfair and deceptive practices, as well as violations of other state laws. JACKSON and putative class members were sold water treatment systems by HOME DEPOT and CWS.

2. During its sale presentations, HOME DEPOT and CWS regularly and systematically utilize a referral program to entice customers that the costs of their water treatment systems will be fully or partially offset by the direct referral of other customers. HOME DEPOT and CWS uniformly represent to its customers

who purchase water treatment systems that if they agree to refer potential purchasing customers, the person making the referrals will be given the water treatment system for free, will receive referral checks to be applied to the balance of their loan, or receive other consideration.

3. In JACKSON's case, he was told that if he referred six individuals, he would receive his system for free. JACKSON made referrals based on this representation and received referral money that was to be applied to his loan. However, neither HOME DEPOT nor CWS gave JACKSON the water treatment system for free as promised based on the referral program. The referral program offered to JACKSON as enticement to buy a water treatment system from HOME DEPOT and CWS violates North Carolina's Referral Sales Statute (N.C. Gen. Stat. § 25A-37).

4. As a result, JACKSON purportedly owes over $12,000 on a water system that originally cost around $9,000, but that was supposed to be free. According to the onerous financing terms, it will take JACKSON 24 years, and $31,000 to pay off the loan. To make matters worse, CITIBANK has sued JACKSON for failure to pay on the loan despite the fact that the transaction was based on an unlawful referral program and deceptive and unfair sales tactics.

5. Accordingly, the Counterclaim and Third-Party Defendants' conduct violates North Carolina's referral sales' statute, N.C. Gen. Stat. § 25A-37, and North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. ("UDTPA").

II. JURSIDICTION AND VENUE

6. This Court has jurisdiction over the claims alleged herein against the Counterclaim and Third-Party Defendants in that at all times relevant to the events and transactions alleged herein, the Counterclaim and Third-Party Defendants solicited, marketed, financed and sold water treatment systems to persons in this State, collected payments from persons in this State at the Counterclaim and Third-Party Defendants' order or direction, and otherwise acted in a manner to mitigate any due process concerns.

7. Venue is proper in this county since the acts alleged herein occurred in Mecklenburg County, North Carolina.

III. PARTIES

8. JACKSON is a natural person and resident of Mecklenburg County, North Carolina.

9. CITIBANK is a New York Corporation headquartered in Sioux Falls, South Dakota. CITIBANK does business in Mecklenburg County, and throughout the state of North Carolina.

10. HOME DEPOT is a Delaware corporation with its principal place of business at 2455 Paces Ferry Road, Atlanta, Georgia 30339. HOME DEPOT does business in Mecklenburg County, and throughout the state of North Carolina, with a North Carolina registered mailing address of 327 Hillsborough Street, Raleigh, North Carolina 27603.

11. CWS is a North Carolina corporation with its principal place of business at 211a E. Dameron Ave., Liberty, North Carolina 27298. CWS does business in

Mecklenburg County, and throughout the state of North Carolina.

12. Upon information and belief, HOME DEPOT and CWS have entered into an agreement whereby CWS has agreed to sell water treatment systems as a HOME DEPOT representative, installation professional and/or agent. At all relevant times, HOME DEPOT and CWS solicited, distributed and sold water treatment systems to individuals in North Carolina using an unlawful systematic referral program as discussed in more detail below.

IV. FACTUAL ALLEGATIONS

13. Sometime in July 2014, the HOME DEPOT and CWS's sales representative called JACKSON for the purposes of soliciting and selling a water treatment system to him. The sales representative was notified of JACKSON's contact information by a friend of JACKSON who purchased a water treatment system, and who was taking part in HOME DEPOT and CWS's referral program.

14. Within the initial phone call, the HOME DEPOT and CWS's sales representative stated that he recently tested a friend's water and that there were "coal ash" problems and cancer-causing agents found in the tap water. The sales representative stated that because of this, JACKSON'S friend purchased a water treatment system to eliminate the problem. Within this initial phone call, the sales representative set up an appointment to come by JACKSON's home for the purpose of testing his water.

15. On or about July 24, 2014, HOME DEPOT and CWS's sales representative showed up at JACKSON's house for the purpose of conducting a water

test. However, the simple water "test" was in fact a full sales presentation, which included props and a sales pitch, and lasted over three hours.

16. During the sales presentation, the sales representative conducted a few water tests, including one test that required the use of vials of JACKSON's tap water from the faucet and the dropping of liquids into each vial. The sales representative indicated to JACKSON that he needed to protect himself because his water was unsafe and that there were cancer-causing agents in the water.

17. In addition, the sales representative showed JACKSON various documents, charts and graphs which represented information that mislead JACKSON into believing his tap water was harmful to his health.

18. After listening to hours of the sales presentation, JACKSON asked how much the water system cost. After the sales representative indicated that it was $8,900, JACKSON indicated that he could not afford the product. However, the sales representative represented that JACKSON could receive the product for free if he referred six customers who purchased a water system. He also stated that JACKSON's friend was taking part in the program and that he could receive checks of $200 for each referral who bought a water system and $100 for each referral who simply listened to the sales presentation. In addition, the sales representative informed JACKSON that he would qualify for financing through HOME DEPOT which offered 0% interest for 24 months, with payments of only $80 per month, plus a HOME DEPOT gift card of $20.

19. Further, HOME DEPOT and CWS's sales representative stated that if JACKSON purchased the water treatment system that day, he would qualify for a promotion whereby he didn't have to pay sales tax. Upon information and belief, customers were not required to pay sales tax on the water treatment systems sold by HOME DEPOT and CWS.

20. Based on the representations made about the poor quality of his home tap water, and the vastly improved quality of the water from the HOME DEPOT and CWS water treatment system, along with the promise that the system would be free after six referrals bought a water system and monetary incentives for making referrals, plus free soap and cleaning products, and the low interest rates available for financing, JACKSON decided to purchase HOME DEPOT and CWS's water treatment system that day.

21. HOME DEPOT and CWS's representative informed JACKSON that he qualified for financing through HOME DEPOT's card services, but that as long as he provided 6 referrals who bought a water system, JACKSON would not be required to pay for the water treatment system.

22. The water treatment system was installed at JACKSON's home the next day on July 25, 2014, and before JACKSON's three-day right to cancel had expired. However, HOME DEPOT and CWS did not present JACKSON with the terms of his purchase until at least August 6, 2014 when he signed the Home Improvement Agreement ("HIA") with HOME DEPOT. A true and correct copy of the HIA is attached as **Exhibit A**.

23. At all relevant times, CWS was acting as an authorized representative and agent of HOME DEPOT.

24. The HIA and JACKSON's purchase was financed through HOME DEPOT either directly through CITIBANK, or by subsequent assignment.

25. Soon after his purchase, JACKSON began referring customers to HOME DEPOT and CWS in order to satisfy the referral program. JACKSON used the forms given by HOME DEPOT and CWS in referring his friends and neighbors. JACKSON received at least one check from the Counterclaim and Third-Party Defendants in the amount of $100 based on one of his successful referrals.

26. However, despite the HOME DEPOT and CWS representative's reassurances and promises, JACKSON did not receive his water treatment system free of charge.

27. To make matters worse, after the first year, JACKSON'S interest rate jumped to 25.99% despite the sales representative's assurances that he would have 0% interest for 24 months. As part of the interest rate increase, back interest in the amount of approximately $400 was charged to JACKSON.

28. JACKSON is now stuck with a 25.99% interest rate and a balance of over $12,000 for a product with a retail price of $1,500 or less. According to the current financing terms, it would take JACKSON 24 years, and $31,000 to pay off the purchase of the water treatment system.

29. JACKSON has made several attempts to cancel the transaction and tender his equipment back to the Counterclaim and Third-Party Defendants and

their representatives based on the various misrepresentations made by HOME DEPOT and CWS, but was not allowed to.

30. As a result, JACKSON has been sued by CITIBANK for amounts purportedly owed in excess of $12,000 as it relates to the sale of the water treatment system at issue.

V. ALLEGATIONS COMMON TO THE CLASS

31. CWS is an authorized representative and agent of HOME DEPOT and routinely enters into contracts on behalf of HOME DEPOT through the use of Home Improvement Agreements such as the one used in the JACKSON transaction and attached as Exhibit A.

32. HOME DEPOT and CWS use a well-planned marketing scheme designed to help them avoid certain laws related to telephone solicitation and home improvement sales. HOME DEPOT and CWS knowingly and willfully target new homeowners and other customers using a referral based system, whereby customers refer their friends with the promise that a certain number of referrals will allow the customer to get the water treatment system for free. This gives HOME DEPOT and CWS a constant source of sales leads while enticing customers to purchase the product under the guise that it will be free.

33. At all relevant times, HOME DEPOT and CWS regularly and systematically used an unlawful referral program to entice customers into purchasing the water treatment equipment under the customers' mistaken belief that the cost of the water treatment system would be fully or partially offset based on the referral of other customers.

34. Some customers are approached by HOME DEPOT and CWS when they shop at HOME DEPOT using standardized communications and "water test kits," while others are contacted after a neighbor or a friend refers them. All customers are offered to take part in the HOME DEPOT referral system.

35. To help arrange sales demonstrations, HOME DEPOT and CWS routinely and systematically offer a free test of the consumer's tap water.

36. Instead of a brief water test, when HOME DEPOT and CWS gain access to a homeowner's residence, a well-structured, standardized sales pitch occurs that is uniform in virtually every case, and which often lasts three hours or longer. HOME DEPOT and CWS employ a scripted presentation that employees and representatives are required to memorize and to follow in every home solicitation sales pitch. The scripted pitch does include a water "test," which is designed to frighten and deceive the average homeowners, and to cause concern over the safety of the homeowner's tap water.

37. The water "tests" employed by HOME DEPOT and CWS involves the taking of vials of the tap water and adding, unidentified chemical drops. In reality, this precipitant test only measures the hardness of the water and not whether it's harmful or contains contaminants. This test is used to improperly infer that the tap water contains pollution, harmful chemicals, and other cancer-causing carcinogens.

38. HOME DEPOT and CWS's water test scheme is so notorious that multiple states have specifically warned consumers to avoid being duped by it.[1]

39. The purpose of HOME DEPOT and CWS's deceptive sales pitch and demonstration is to coerce the homeowner into buying the water softener on the spot. Upon information and belief, HOME DEPOT and CWS pay $800-$1,000 for the water softeners at issue which are sold for $8,990 to customers. The same type of water softener can be purchased from many retailers for less than $1,400.

40. To further coerce reluctant homeowners to buy their excessively overpriced water softener and to provide for additional leads and sales opportunities, HOME DEPOT and CWS use a referral program in their sales, which represents that their water system will effectively be free or at a reduced cost to the consumer if they refer a certain number of customers.

---

[1] For example, the state of Florida Attorney General's website states:

> **"How to Protect Yourself: Water Treatment Devices: Avoid "Free" home water tests**
>
> Fraudulent sellers that advertise "free home water testing" may only be interested in selling you their water treatment device, whether you need it, or not. In performing the test, the salesperson may add tablets or droplets of chemicals to your tap water, explaining that the water will change color or that particles will form if the water is contaminated. When the water changes color before your eyes, the salesperson may warn you that the water is polluted and may cause cancer. In almost all of these cases, any water (even spring water) would "fail" the company's test."

(http://myfloridalegal.com/pages.nsf/main/3d0fd1650fc920c485256cc900698282!OpenDocument.)

41. Once a homeowner has agreed to purchase and finance a water softener, the HOME DEPOT and CWS arrange for installation of the water softener within twenty-four hours of the sale. This quick turn-around from sale to installation accomplishes several important goals for HOME DEPOT and CWS. First, it is much more difficult for a homeowner to change his mind if the equipment has been installed. Cancellation rates are significantly reduced in this manner. Second, HOME DEPOT and CWS routinely do not bring the homeowner's finance contract until at least three days after the initial sale occurs.

42. When the finance contract is presented by HOME DEPOT and CWS, many homeowners discover for the first time that they will actually be paying an exorbitant rate of interest, as high as 25.99%. Homeowners are unable to cancel the sale because their three-day right to cancel the transaction has expired. This leaves most homeowners with no option but to sign the finance contract.

43. Many homeowners, however, never even see that the interest rate is much higher than they were promised, until they receive their first monthly statement. HOME DEPOT'S HIA, at the time of JACKSON's purchase, did not disclose the interest rate that would apply.

44. Despite the fact that HOME DEPOT and CWS's referral program and tests constitute unfair and deceptive trade practices, HOME DEPOT and CWS continue to uniformly represent this information to customers because their entire business model is based on the referral program and fear tactics regarding the condition of their tap water.

VI. CLASS ACTION ALLEGATIONS

45. Pursuant to Rule 23 of the Rules of Civil Procedure (N.C. G.S. § lA-1, Rule 23), JACKSON brings this action for himself and on behalf of all other persons similarly situated.

46. The Class(es) sought to be certified are defined as follows:

> **HOME DEPOT CLASS:** All persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for "water treatment" equipment substantially similar to Exhibit A, during the Class Period.
>
> **CWS CLASS:** All persons in the state of North Carolina that purchased a Water Treatment System from Carolina Water Systems, Inc., during the Class Period.

47. The Class Period for each claim begins four years prior to the filing of the claims asserted herein and ends when notice certifying the Class(es) is ordered by the Court.

48. JACKSON is unable to state the exact number of members of the Class(es) because that information is solely in the possession of the Counterclaim and Third-Party Defendants. However, JACKSON believes that the putative Class(es) exceed several hundred customers and is therefore so numerous that joinder of all members would be impracticable.

49. Questions of law or fact common to the Class(es) exist and predominate over questions affect-

ing only individual members, including, *inter alia*, the following:

(a) Whether HOME DEPOT and CWS's selling of water treatment systems using a referral system violates the North Carolina's Referral Sales statute and/or G.S. § 75-1.1;

(b) Whether HOME DEPOT and CWS's use of the unlawful referral program constitutes an unfair and deceptive trade practices in violation of G.S. § 75-1.1; and

(c) Whether HOME DEPOT and CWS's standardized testing procedure constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1

50. The claims asserted by JACKSON in this action are typical of the claims of the members of the Class(es) as defined above because HOME DEPOT and CWS use standardized referral programs, scripts, and contracts. The claims in this action arise from the uniform course of conduct by HOME DEPOT and CWS in the unlawful sale of $9,000 water treatment systems to Class members based on an illegal referral program and based upon a false and misleading water test. Because HOME DEPOT and CWS routinely solicit customers based on a uniform referral sales program, JACKSON's claims are typical of the Class(es) he seeks to represent.

51. JACKSON will fairly and adequately represent and protect the interests of the members of the Class(es) because he has no interest antagonistic to the Class(es) he seeks to represent, and because the adjudication of his claims will necessarily decide the identical issue for other class members. There is nothing peculiar about JACKSON's transaction that would

make him inadequate as class representative. JACKSON has retained counsel competent and experienced in both consumer protection and class action litigation.

52. A class action is superior to other methods for the fair and efficient adjudication of this controversy because the economic damages suffered by each individual class member will be relatively modest, compared to the expense and burden of individual litigation. It would be impracticable for each class member to seek redress individually for the wrongful conduct alleged herein because the cost of such individual litigation would be cost prohibitive. It would be difficult, if not impossible, to obtain counsel to represent JACKSON and other class members on an individual basis for such small claims. More importantly, the vast majority of class members are not aware that the referral scheme and contracts used by HOME DEPOT and CWS violate the UDTPA and other state laws, and a class action is the only viable means of adjudicating their rights. There will be no difficulty in the management of this litigation as a class action, as the legal issues affect a standardized pattern of conduct by HOME DEPOT and CWS.

53. HOME DEPOT and CWS also acted and refused to act on grounds generally applicable to the Class(es), thereby making appropriate declaratory relief and corresponding final injunctive relief with respect to the Class(es) as a whole. HOME DEPOT and CWS should be enjoined from the conduct alleged herein.

COUNT I
VIOLATION OF REFERRAL SALES STATUTE
BY HOME DEPOT AND CWS

54. JACKSON re-alleges paragraphs 1 through 53 above as if set forth fully in this Count.

55. Third Party Defendants HOME DEPOT and CWS advertise, solicit and sell water treatment systems and other personal goods and services through home solicitation and referral sales. HOME DEPOT and CWS knowingly and willfully solicit and sell their water treatment systems by offering free products and/or compensation to potential customers who agree to refer other purchasing customers to HOME DEPOT and CWS.

56. JACKSON and Class members were solicited by HOME DEPOT and CWS at their homes, and purchased water treatment systems after HOME DEPOT and CWS represented that the purchase price of the water treatment systems would be reimbursed after they referred other individuals to listen to HOME DEPOT and CWS's sales demonstrations, and that they would receive referral checks for successful referrals.

57. North Carolina's Referral Sales statute states:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) **at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful**. Any obligation of a buyer aris-

> ing under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

58. A "referral sale" is a transaction in which a person is induced to purchase goods or service upon the representation that the purchaser can reduce or recover the purchase price, or earn a commission or other consideration, by referring other prospective buyers to the seller for similar purchases.

59. Here, JACKSON and class members purchased a water treatment system from HOME DEPOT and CWS that included payments and other consideration based upon the procurement of prospective customers in violation of G.S. § 25A-37.

60. Exhibit A is a HOME DEPOT contract for JACKSON's transaction which specifically references the referral program

61. JACKSON's and class members' contracts and sales constitute an unlawful referral sale in violation of G.S. § 25A-37.

62. As a result, JACKSON and class members are entitled to a declaration that their obligations under the agreement are void and a nullity, damages (including but not limited to consideration paid), injunctive relief, and attorney's fees and costs as allowable under the Referral Sales Statute, and the agreements at issue.

COUNT II
VIOLATION OF NORTH CAROLINA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT BY HOME DEPOT AND CWS

63. JACKSON re-alleges paragraphs 1 through 62 above as if set forth fully in this Count.

64. G.S. § 75-1.1 states that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

65. The purpose of G.S. § 75-1.1 was "to encourage enforcement of the act by private individuals injured by unfair trade practices."

66. HOME DEPOT and CWS's soliciting, financing, and selling of water treatment systems through home solicitations and referral sales constitutes "commerce" as defined by G.S. §75-1.1.

67. HOME DEPOT and CWS's violation of the Referral Sales statute constitutes a *per se* violation of G.S. § 75-1.1 (see G.S. § 25A-44(4)).

68. Moreover, HOME DEPOT and CWS violated G.S. § 75-1.1 by, inter alia, engaging in the following unfair and deceptive trade practices:

a. Performing precipitant tests on customers' tap water;

b. Uniformly failing to present customers with financing terms until after the equipment has been installed in the home;

c. Circumventing the customers' three-day right to cancel by installing the equipment the next day and before financing terms are disclosed; and

d. In other ways to be shown at trial.

69. As a proximate result of HOME DEPOT and CWS's unfair and deceptive conduct, JACKSON and class members have been harmed.

70. JACKSON and class members are entitled to restitution and treble damages pursuant to G.S. § 75-16, as a remedy to HOME DEPOT and CWS's continuing pattern and practice of unfair and deceptive trade practices.

71. JACKSON and class members are also entitled to injunctive relief, and attorney's fees and costs pursuant to G.S. § 75-16.1.

COUNT III
HOLDER RULE LIABILITY AGAINST CITIBANK
(INDIVIDUAL CLAIM ONLY)

72. JACKSON re-alleges paragraphs 1 through 71 above as if set forth fully in this Count.

73. JACKSON asserts this claim on an individual basis only and not on behalf of any class.

74. Pursuant to G.S. § 25A-25 and the HIA at Exhibit A, in a consumer credit sale, a buyer may assert against the seller, assignee of the seller, or other holder of the instrument of indebtedness any claims or defenses available against the original seller.

75. CITIBANK is subject to all claims and defenses that JACKSON has against HOME DEPOT and CWS for the unfair and deceptive manner in which the water treatment system at issue was sold, including the representation that the system would be free after six referrals. Therefore, CITIBANK is jointly and severally liable to JACKSON, who financed the purchase of his water treatment system through

HOME DEPOT, which directly sold or assigned the transaction to CITIBANK.

76. JACKSON's obligations under the sale are null and void, and he is entitled to recover all amounts paid to CITIBANK.

77. JACKSON is also entitled to all relief available against CITIBANK, including attorney's fees and costs, pursuant to HOME DEPOT and CWS's violations of G.S. § 75-1.1.

PRAYER FOR RELIEF

WHEREFORE, JACKSON, individually and on behalf of all others similarly situated, prays for a judgement against the Counterclaim and Third-Party Defendants, as follows:

a) For an order certifying the Class(es), pursuant to Rule 23 of the North Carolina Rules of Civil Procedure as provided in N.C. Gen. Stat. § 1 A-1;

b) For an order appointing JACKSON as representative of the Class(es), and appointing the law firms representing JACKSON as counsel for the Class(es);

c) Enter all appropriate orders, for discovery and otherwise, consistent therewith; and

d) Enjoin the Counterclaim and Third-Party Defendants from further violations of N.C. G.S. § 25A-37 and § 75-1.1.

DEMAND FOR A JURY TRIAL

JACKSON, on behalf of himself and all others similarly situated, hereby demands a trial by jury.

Dated: August 26, 2016

* * *

GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
NORTH CAROLINA
MECKLENBURG COUNTY

16 CVD 10961

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

CITIBANK, N.A. NOTICE OF VOLUNTARY DISMISSAL WITHOUT PREJUDICE

Pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure, Plaintiff Citibank, N.A. hereby gives notice of dismissal without prejudice of the claims that Plaintiff Citibank, N.A. has asserted against George W. Jackson in this action. As to the claims asserted by Plaintiff Citibank, N.A. against George W. Jackson, each party shall bear its own attorneys' fees and costs.

This the 23rd day of September, 2016.

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

Case No. 16 CVD 10961, Removed from
the General Court of Justice, District Court Division,
Mecklenburg County, North Carolina

CITIBANK, N.A.,
Plaintiff/Counter-Defendant,

v.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Defendant/Counter-Plaintiff.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Counter-Plaintiff and Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC., AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

NOTICE OF REMOVAL

Third-Party Defendant Home Depot U.S.A., Inc. ("Home Depot") hereby files this Notice of Removal of this action from the General Court of Justice, District Court Division, Mecklenburg County, North Carolina, to the United States District Court for the Western District of North Carolina. This Notice of Removal is filed pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453 on the basis of the following facts, which show that this case may be removed to this Court:

1. Home Depot has been sued in a civil action entitled *Citibank, N.A. v. George W. Jackson, on behalf*

of himself and others similarly situated, Case No. 16 CVD 10961, in the General Court of Justice, District Court Division, Mecklenburg County, North Carolina (the "State Court Action").

2. Counter-Plaintiff George W. Jackson ("Jackson") filed his Answer, Affirmative Defenses, Counterclaim and Third-Party Class Action Claims (the "Complaint"), naming Home Depot as a counterclaim defendant for the first time, on August 26, 2016. In addition to Home Depot, the Complaint names as Counter-Defendant Citibank, N.A. ("Citibank") and Third-Party Defendant Carolina Water Systems, Inc. ("CWS," and, together with Home Depot and Citibank, "Counter-Defendants"). Home Depot and CWS were previously not parties in this case.

3. As set forth more fully below, this case may be removed to this Court pursuant to 28 U.S.C. §§ 1441 and 1453 because Home Depot has satisfied the procedural requirements for removal, and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(d).

I. HOME DEPOT HAS SATISFIED THE PROCEDURAL REQUIREMENTS FOR REMOVAL.

4. Jackson purported to serve Home Depot with the Complaint on September 12, 2016. (*See* Exhibit A.) Accordingly, this Notice of Removal is timely under 28 U.S.C. § 1446(b) because it was filed within thirty days after receipt by Home Depot, through service or otherwise, of a copy of the "initial pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable." 28 U.S.C. § 1446(b).

5. As of the date of this removal, Home Depot has not filed a responsive pleading to the Complaint. Home Depot reserves all rights to assert any and all defenses or otherwise respond to the Complaint. Home Depot further reserves the right to amend or supplement this Notice of Removal.

6. Venue lies in the United States District Court for the Western District of North Carolina, pursuant to 28 U.S.C. § 1441(a), because the original action was filed in a state court located within the Western District of North Carolina. Venue, therefore, is proper in this Court because it is the "district and division embracing the place where such action is pending." *See* 28 U.S.C. § 1441(a).

7. Pursuant to 28 U.S.C. § 1446(a), true and exact copies of the Summons and Complaint served on Home Depot are attached as Exhibit A, and all other process, pleadings, and orders served on Home Depot in this matter are attached as Exhibit B. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Jackson, and a copy is being filed with the clerk of the General Court of Justice, District Court Division, Mecklenburg County, North Carolina.

8. On September 23, 2016, Citibank, the sole original plaintiff, voluntarily dismissed its claim against Jackson. Citibank's Notice of Voluntary Dismissal Without Prejudice is attached hereto as Exhibit C. As a result, the only claim that is now pending is Jackson's putative class action against Home Depot, CWS, and Citibank, making Jackson the only plaintiff in the case. Accordingly, a motion for realignment, to identify Jackson as Plaintiff and Home Depot, CWS,

and Citibank as Defendants, will be filed with the Court.

9. Home Depot has never been a plaintiff in the State Court Action. Because Home Depot was brought into this case for the first time as a third-party counterclaim defendant, and because Jackson is now the only plaintiff in this case, Home Depot is a defendant who may properly remove the case under 28 U.S.C. §§ 1441 and 1453.[1]

II. REMOVAL IS PROPER BECAUSE THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332.

10. The Court has original jurisdiction over this action, and the action may be removed to this Court, under the Class Action Fairness Act of 2005 ("CAFA"). Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of Title 28).

11. As set forth below, this is a putative class action in which: (1) there are more than 100 members in the putative class proposed by Jackson; (2) at least one

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[1] *Palisades Collections LLC v. Shorts*, 552 F.3d 327 (4th Cir. 2008), which interpreted CAFA removal not to apply to counterclaim or third-party defendants, does not control the outcome here for two reasons. First, the Supreme Court's recent decision in *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014), undercuts the reasoning of the *Palisades* majority. *See, e.g., Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 912 (11th Cir. 2014) (*Dart Cherokee* "overrule[d]" prior decisions applying "any presumption in favor of remand" to CAFA). Second, in *Palisades*, there was no dismissal of the original claim, and no realignment—the original plaintiffs in that case remained plaintiffs. That is not true here, where Jackson is now the only plaintiff.

member of the proposed class is a citizen of a different state than at least one Counter-Defendant; and (3) based upon the allegations in the Complaint, the claims of the putative class members exceed the sum or value of $5 million in the aggregate, exclusive of interest and costs. Thus, this Court has original jurisdiction over this action, and the action may be removed to this Court pursuant to 28 U.S.C. § 1332(d)(2).

A. The Proposed Class Consists of More Than 100 Members.

12. Jackson purports to bring this case as a class action on behalf of two classes: (1) "[a]ll persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for 'water treatment' equipment substantially similar to [the one attached to the Complaint as an exhibit]" during the four years prior to the filing of the Complaint, and (2) "[a]ll persons in the state of North Carolina that purchased a Water Treatment system from Carolina Water Systems, Inc." during the four years prior to the filing of the Complaint. (Compl. ¶ 46.) The Complaint alleges that "the putative Class(es) exceed several hundred customers." (*Id.* ¶ 48.)

13. Accordingly, based on the allegations in the Complaint, the aggregate number of members of the putative class is greater than 100 for purposes of 28 U.S.C. § 1332(d)(5)(B).

B. Minimal Diversity Exists.

14. This Court has original jurisdiction under CAFA when the parties in a class action are minimally diverse. *See* 28 U.S.C. § 1332(d)(2)(A) ("The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the

sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which – (A) *any member of a class of plaintiffs is a citizen of a State different from any defendant*. . . .) (emphasis added).

15. Home Depot is, and was at the time it was served with the Complaint, a corporation duly organized and validly existing under the laws of the State of Delaware, which maintains its principal place of business in Georgia. (Compl. ¶ 10.) Home Depot, therefore, is a citizen of Delaware and Georgia.

16. Plaintiff Jackson alleges that he is a citizen of North Carolina. (Compl. ¶ 8.) He also purports to represent other class members from North Carolina. (Compl. ¶ 31.)

17. Because at least one member of the putative class is diverse from at least one defendant, the requirements for minimal diversity under 28 U.S.C. § 1332(d)(2)(A) are satisfied.

C. The Amount in Controversy Exceeds $5 Million.

18. "Courts generally determine the amount in controversy by reference to the plaintiff's complaint." *JTH Tax, Inc. v. Frashier*, 624 F.3d 635, 638 (4th Cir. 2010). "In most cases, the sum claimed by the plaintiff controls the amount in controversy determination." *Id.* (internal quotation marks omitted). At the appropriate time, Home Depot will demonstrate that Jackson and the putative class are not entitled to any of the relief sought in the Complaint, but for purposes of the removal analysis, the allegations in the Complaint demonstrate that the amount in controversy exceeds $5 million.

19. This action arises out of alleged misconduct by sales representatives of CWS in connection with the sale of water treatment systems. The Complaint generally alleges that Jackson and the purported class(es) have suffered injury based on "the unlawful sale of $9,000 water treatment systems to Class members based on an illegal referral program and based upon a false and misleading water test." (Compl. ¶ 50.)

20. The Complaint seeks, among other remedies, "damages (including but not limited to consideration paid), injunctive relief, and attorney's fees and costs." (Compl. ¶¶ 62, 71.) The Complaint also seeks "restitution and treble damages" under the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"). (Compl. ¶ 70.)

21. The Complaint therefore seeks damages in the amount of at least $9,000 per person (Compl. ¶ 50) on behalf of "several hundred customers" (*id.* ¶ 48), and then seeks to triple that amount (*id.* ¶ 70).

22. Assuming a class of 200 members (the smallest number that might conceivably qualify as "several hundred"), the amount in controversy in this case based solely on this speculative element of the putative class members' alleged damages is at least $5,400,000.

23. Moreover, as noted above, in addition to "damages (including but not limited to consideration paid)," "restitution and treble damages," the Complaint also seeks injunctive relief and attorneys' fees (Compl. ¶¶ 62, 70, 71), reinforcing the conclusion that the amount in controversy far exceeds $5 million.

24. The request for an award of attorneys' fees must be considered in determining the amount in con-

troversy. *See Respess v. Crop Prod. Servs., Inc.*, No. 4:15-CV-00176-BR, 2016 WL 3821163, at *3 (E.D.N.C. July 13, 2016) (aggregating damages alleged in complaint to evaluate amount in controversy because "it is facially apparent that plaintiffs' UDTPA claim could result in an award of treble damages and attorneys' fees in addition to actual damages").

25. If Jackson is successful in his pursuit of attorneys' fees, that itself could add upwards of a million dollars to the recovery amount. *See Cole v. Wells Fargo Bank*, N.A., No. 1:15-CV-00039-MR, 2016 WL 737943, at *4 (W.D.N.C. Feb. 23, 2016) (in case involving alleged unfair and deceptive trade practices, "applying experience and common sense, this Court estimates that if the Plaintiff prevails in this matter, that his attorneys' fees will *very likely exceed* the [approximately 16%] left to reach the jurisdictional threshold") (emphasis added).

26. Based on these facts, the amount in controversy of this putative class action far exceeds $5 million.

27. While Home Depot believes that the claims in the Complaint fail on the merits and class certification is not appropriate in this action, based on the Complaint's allegations, the amount in controversy in this matter (including, but not limited to, the requested disgorgement, punitive damages, and attorneys' fees) exceeds the jurisdictional threshold of $5 million set forth in 28 U.S.C. § 1332(d).

III. CONCLUSION

28. For all the reasons stated above, this action is removable to this Court pursuant to 28 U.S.C. §§ 1441,

1446 and 1453, and this Court may exercise jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d).

29. Promptly after the filing of this Notice of Removal, in accordance with 28 U.S.C. § 1446(d), Home Depot will give written notice of the Notice of Removal to Jackson and will file a copy of this Notice of Removal with the General Court of Justice, District Court Division, Mecklenburg County, North Carolina.

WHEREFORE, this action is hereby removed from the General Court of Justice, District Court Division, Mecklenburg County, North Carolina, to the United States District Court for the Western District of North Carolina pursuant to 28 U.S.C. §§ 1332(d), 1441 and 1453(b).

Respectfully submitted this 12th day of October, 2016.

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff/Counterclaim-Defendant,

v.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Defendant/Counterclaim-Plaintiff.

GEORGE W. JACKSON, on behalf of himself
and others similarly situated,
Counter-Plaintiff and Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC., AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

COUNTER-PLAINTIFF'S MOTION TO REMAND

Pursuant to 28 U.S.C. § 1447 (c), and for the reasons more fully addressed in the accompanying Memorandum of Law, Counter-Plaintiff and Defendant George Jackson, by and through undersigned counsel, hereby moves this Honorable Court for an Order remanding this matter to the General Court of Justice, District Court Division.

Third-Party Defendant Home Depot has not and cannot meet its burden of proof that this action meets the Class Action Fairness Act of 2005's ("CAFA") jurisdictional threshold of more than $5 million in controversy. 28 U.S.C. § 1332(d)(2). Also, the requirements of the local controversy exception to CAFA have been met and mandate remand. In addition, controlling

precedent expressly prohibits removal by a third-party/additional counter defendant like Home Depot.

For all these reasons, Counter-Plaintiff Jackson respectfully requests that the Court grant his Motion to Remand and award the reasonable attorneys' fees, costs and expenses associated with the preparation of this motion.

Dated: November 8, 2016

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

AMENDED THIRD PARTY CLASS ACTION CLAIMS

JURY TRIAL DEMANDED
INJUNCTIVE RELIEF SOUGHT

CASE REMOVED FROM
THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
MECKLENBURG COUNTY, NORTH CAROLINA,
16 CVD 1096

MOTION FOR REMAND PENDING

THIRD-PARTY CLASS ACTION CLAIMS

Third-Party Plaintiff, George W. Jackson ("JACKSON"), by and through the undersigned counsel, brings class action third-party claims against third-party defendants HOME DEPOT, U.S.A., INC. ("HOME DEPOT") and CAROLINA WATER SYSTEMS, INC. ("CWS"), as follows:

CLASS ACTION THIRD-PARTY CLAIMS

Third-Party Plaintiff JACKSON, on behalf of himself and all others similarly situated, brings claims against the Third-Party Defendants, as follows:

I. INTRODUCTION

1. JACKSON and putative class members were sold water treatment systems by HOME DEPOT and CWS. This is a consumer class action seeking to remedy HOME DEPOT and CWS's unfair and deceptive practices, as well as violations of other state laws.

2. North Carolina's Referral Sales Statute states prohibits the conduct at issue:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) **at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful**. Any obligation of a buyer arising under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

3. HOME DEPOT and CWS regularly and systematically utilize an illegal "Referral Program" to entice customers into purchasing an exorbitantly priced water treatment system. Under the HOME DEPOT and CWS referral program, customers who agree to refer other potential purchasing customers, the person making the referrals will be given the water treatment system for free, will receive referral checks to be

applied to the balance of their loan, or receive other valuable consideration.

4. However, the Referral Program offered to JACKSON violates North Carolina's Referral Sales Statute (N.C. Gen. Stat. § 25A-37), which prohibits such programs.

5. Accordingly, the Third-Party Defendants' conduct violates North Carolina's Referral Sales' statute, N.C. Gen. Stat. § 25A-37, and North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. ("UDTPA").

6. As a result of the North Carolina Referral Sales Statute, any and all contracts for the sale of water treatment systems under the Referral Program are "void and a nullity," including all contracts between Jackson and HOME DEPOT, CWS, or others having anything to do with the water treatment systems at issue.

II. JURSIDICTION AND VENUE

7. Third-Party Plaintiff Jackson contests the jurisdiction of this federal court, and has filed a Motion to Remand this entire case to state court for lack of CAFA jurisdiction.

8. The General Court of Justice, District Court Division, Mecklenburg County, North Carolina has proper jurisdiction over the claims alleged herein against the Third-Party Defendants in that at all times relevant to the events and transactions alleged herein, the Third-Party Defendants solicited, marketed, and sold water treatment systems to persons in this State, and otherwise acted in a manner to mitigate any due process concerns.

9. Venue is proper in Mecklenburg County, North Carolina since the acts alleged herein occurred in that county.

III. PARTIES

10. JACKSON is a natural person and resident of Mecklenburg County, North Carolina.

11. HOME DEPOT is a Delaware corporation with its principal place of business at 2455 Paces Ferry Road, Atlanta, Georgia 30339. HOME DEPOT does business in Mecklenburg County, and throughout the state of North Carolina, with a North Carolina registered mailing address of 327 Hillsborough Street, Raleigh, North Carolina 27603.

12. CWS is a North Carolina corporation conducting business in North Carolina and has its principal place of business at 1705 Orr Industrial Ct., Suite D, Charlotte, North Carolina 28213.

13. Upon information and belief, HOME DEPOT and CWS have entered into an agreement whereby CWS has agreed to sell water treatment systems as a HOME DEPOT representative, installation professional and/or agent. At all relevant times, HOME DEPOT and CWS solicited, distributed and sold water treatment systems to individuals in North Carolina using an unlawful systematic Referral Program as discussed in more detail below.

IV. FACTUAL ALLEGATIONS

14. Upon information and belief, beginning in 2014, HOME DEPOT and CWS routinely telephoned persons in the State of North Carolina for the purposes of soliciting and selling water treatment systems.

15. Upon information and belief, HOME DEPOT and CWS would represent that the contact information of the prospective purchaser was obtained from a person who purchased a water treatment system, and who was taking part in HOME DEPOT and CWS's Referral Program.

16. HOME DEPOT and CWS would represent to potential customers that "contaminants" were found in the tap water in nearby locations and infer that their tap water was unsafe.

17. HOME DEPOT and CWS set up appointments to come by a prospective purchaser's home for the purpose of "testing" their tap water.

18. HOME DEPOT and CWS would show up at the prospective purchaser's house for the purpose of conducting a water test. However, the simple water "test" was in fact a full sales presentation, which included props and a scripted sales pitch.

19. During the sales presentation, HOME DEPOT and CWS conducted a few water tests, including one test that required the use of vials of a prospective purchaser's tap water from the faucet and the dropping of liquids into each vial.

20. Upon information and belief, the water "test" performed by HOME DEPOT and CWS routinely indicated that the prospective purchaser's tap-water was unsafe, contaminated, or that there were cancer-causing agents in the water.

21. In addition, upon information and belief, HOME DEPOT and CWS used standardized documents, charts and graphs as part of its scripted presentation which contained false information

indicating that the prospective purchaser's tap water was harmful to their health.

22. Upon information and belief, HOME DEPOT and CWS enrolled customers into its Referral Program which indicated that they could receive the water treatment system for free if they referred other customers who also purchased a water system. HOME DEPOT and CWS's Referral Program also provided that enrolled customers would receive money towards their purchase price for each referral who bought a water system, and additional money for each referral who simply listened to the sales presentation.

23. Further, HOME DEPOT and CWS also routinely offered a promotion whereby the prospective purchaser didn't have to pay sales tax for the system if they agreed to purchase it immediately. Upon information and belief, customers were not required to pay sales tax on the water treatment systems sold by HOME DEPOT and CWS under North Carolina law.

24. HOME DEPOT and CWS routinely installed their water treatment systems sold under this impermissible Referral Program on the day after the purchase agreement, or Home Improvement Agreement ("HIA) was signed, and before customers' three-day right to cancel had expired.

25. At all relevant times, CWS was acting as an authorized representative and agent of HOME DEPOT.

26. In 2014, JACKSON was a customer who was solicited through the Referral Program and who ultimately purchased a water system under this impermissible Referral Program.

27. JACKSON signed a Home Improvement Agreement ("HIA") with HOME DEPOT. A true and correct copy of the HIA is attached hereto as **Exhibit A**.

28. JACKSON did not receive his water treatment system free of charge, despite making referrals to HOME DEPOT and CWS.

29. To the best of his knowledge, JACKSON has paid $1,080.00 to date for the water system sold to him by HOME DEPOT and CWS

V. ALLEGATIONS COMMON TO THE CLASS

30. CWS is an authorized representative and agent of HOME DEPOT and routinely enters into contracts on behalf of HOME DEPOT through the use of Home Improvement Agreements such as the one used in the JACKSON transaction and attached as Exhibit A.

31. HOME DEPOT and CWS use a standardized and scripted marketing scheme designed to help them avoid certain laws related to telephone solicitation and home improvement sales. HOME DEPOT and CWS knowingly and willfully target new homeowners and other customers using the Referral Program, whereby customers refer their friends with the promise that a certain number of referrals will allow the customer to get the water treatment system for free. This gives HOME DEPOT and CWS a constant source of sales leads while enticing customers to purchase the product under the guise that it will be free.

32. At all relevant times, HOME DEPOT and CWS regularly and systematically used an unlawful Referral Program to entice customers into purchasing the water treatment equipment under the customers' mistaken belief that the cost of the water treatment

system would be fully or partially offset based on the referral of other customers.

33. Some customers are approached by HOME DEPOT and CWS when they shop at HOME DEPOT using standardized communications and "water test kits," while others are contacted after a neighbor, family or friend refers them through the Referral Program. All customers are given the offer to take part in the Referral Program.

34. To help arrange sales demonstrations, HOME DEPOT and CWS routinely and systematically offer a free test of the consumer's tap water.

35. Instead of a brief water test, when HOME DEPOT and CWS gain access to a homeowner's residence, a standardized and scripted sales pitch occurs that is uniform in virtually every case, and which often lasts three hours or longer. HOME DEPOT and CWS employ a scripted presentation that employees and representatives are required to memorize and to follow in every home solicitation. The scripted pitch includes a water "test," which is designed to frighten and deceive the average homeowner, and to cause concern over the safety of the homeowner's tap water.

36. The water "tests" employed by HOME DEPOT and CWS involve the taking of vials of the tap water and adding unidentified chemical drops. In reality, this precipitant test only measures the hardness of the water and not whether it's harmful or contains contaminants. This test is used to improperly infer that the tap water contains pollution, harmful chemicals, and other cancer-causing carcinogens.

37. HOME DEPOT and CWS's water test scheme is so notorious that multiple states have specifically warned consumers to avoid being duped by it.[1]

38. Despite the fact that HOME DEPOT and CWS's Referral Program and tests constitute unfair and deceptive trade practices, HOME DEPOT and CWS continue to uniformly represent this information to customers because their entire business model is based on the Referral Program and fear tactics regarding the condition of their tap water.

VI. CLASS ACTION ALLEGATIONS

39. Pursuant to Rule 23 of the Rules of Civil Procedure (N.C. G.S. § 1A-1, Rule 23), JACKSON brings this action for himself and on behalf of all other persons similarly situated.

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[1] For example, the state of Florida Attorney General's website states:

> **"How to Protect Yourself: Water Treatment Devices: Avoid "Free" home water tests**
>
> Fraudulent sellers that advertise "free home water testing" may only be interested in selling you their water treatment device, whether you need it, or not. In performing the test, the salesperson may add tablets or droplets of chemicals to your tap water, explaining that the water will change color or that particles will form if the water is contaminated. When the water changes color before your eyes, the salesperson may warn you that the water is polluted and may cause cancer. In almost all of these cases, any water (even spring water) would "fail" the company's test."

(http://myfloridalegal.com/pages.nsf/main/3d0fd1650fc920c485256cc900698282!OpenDocument.)

40. The Class(es) sought to be certified are defined as follows:

> **HOME DEPOT CLASS:** All persons in the state of North Carolina that entered into a Home Improvement Agreement with Home Depot for "water treatment" equipment substantially similar to Exhibit A, during the Class Period.
>
> **CWS CLASS**: All persons in the state of North Carolina that purchased a Water Treatment System from Carolina Water Systems, Inc., during the Class Period.

41. The Class Period for each claim begins four years prior to the filing of the claims asserted herein and ends when notice certifying the Class(es) is ordered by the Court.

42. JACKSON is unable to state the exact number of members of the Class(es) because that information is solely in the possession of the Third-Party Defendants. However, JACKSON believes that the putative Class(es) exceed forty (40) customers and is therefore so numerous that joinder of all members would be impracticable.

43. Questions of law or fact common to the Class(es) exist and predominate over questions affecting only individual members, including, *inter alia*, the following:

(a) Whether HOME DEPOT and CWS's selling of water treatment systems using a Referral System violates the North Carolina's Referral Sales statute and/or G.S. § 75-1.1;

(b) Whether HOME DEPOT and CWS's use of the unlawful Referral Program constitutes an unfair and

deceptive trade practices in violation of G.S. § 75-1.1; and

(c) Whether HOME DEPOT and CWS's standardized testing procedure constitutes an unfair and deceptive trade practice in violation of G.S. § 75-1.1

44. The claims asserted by JACKSON in this action are typical of the claims of the members of the Class(es) as defined above because HOME DEPOT and CWS use standardized referral programs, tests, and contracts. The claims in this action arise from the uniform course of conduct by HOME DEPOT and CWS in the unlawful sale of water treatment systems to Class members based on an illegal Referral Program and based upon a false and misleading water test. Because HOME DEPOT and CWS routinely solicit customers based on a uniform Referral Program, JACKSON's claims are typical of the Class(es) he seeks to represent.

45. JACKSON will fairly and adequately represent and protect the interests of the members of the Class(es) because he has no interest antagonistic to the Class(es) he seeks to represent, and because the adjudication of his claims will necessarily decide the identical issue for other class members. There is nothing peculiar about JACKSON's transaction that would make him inadequate as class representative. JACKSON has retained counsel competent and experienced in both consumer protection and class action litigation.

46. A class action is superior to other methods for the fair and efficient adjudication of this controversy because the economic damages suffered by each individual class member will be relatively modest, compared to the expense and burden of individual

litigation. It would be impracticable for each class member to seek redress individually for the wrongful conduct alleged herein because the cost of such individual litigation would be cost prohibitive. It would be difficult, if not impossible, to obtain counsel to represent JACKSON and other class members on an individual basis for such small claims. More importantly, the vast majority of class members are not aware that the referral scheme and contracts used by HOME DEPOT and CWS violate the UDTPA and other state laws, and a class action is the only viable means of adjudicating their rights. There will be no difficulty in the management of this litigation as a class action, as the legal issues affect a standardized pattern of conduct by HOME DEPOT and CWS.

47. HOME DEPOT and CWS also acted and refused to act on grounds generally applicable to the Class(es), thereby making appropriate declaratory relief and corresponding final injunctive relief with respect to the Class(es) as a whole. HOME DEPOT and CWS should be enjoined from the conduct alleged herein.

COUNT I
VIOLATION OF REFERRAL SALES STATUTE
BY HOME DEPOT AND CWS

48. JACKSON re-alleges paragraphs 1 through 47 above as if set forth fully in this Count.

49. Third Party Defendants HOME DEPOT and CWS sell water treatment systems through home solicitation and referral sales. HOME DEPOT and CWS knowingly and willfully solicit and sell their water treatment systems by offering free products and/or

compensation to potential customers who agree to refer other customers to HOME DEPOT and CWS.

50. JACKSON and Class members were solicited by HOME DEPOT and CWS at their homes, and purchased water treatment systems after HOME DEPOT and CWS represented that the purchase price of the water treatment systems would be reimbursed after they referred other individuals to listen to HOME DEPOT and CWS's sales demonstrations, and that they would receive referral checks for referrals.

51. North Carolina's Referral Sales statute states:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) **at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful**. Any obligation of a buyer arising under such a sale shall be void and a nullity and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

52. A "referral sale" is a transaction in which a person is induced to purchase goods or service upon the representation that the purchaser can reduce or recover the purchase price, or earn a commission or

other consideration, by referring other prospective buyers to the seller for similar purchases.

53. Here, JACKSON and class members purchased a water treatment system from HOME DEPOT and CWS that included payments and other consideration based upon the procurement of prospective customers in violation of G.S. § 25A-37.

54. Exhibit A is a HOME DEPOT contract for JACKSON's transaction which specifically references the Referral Program.

55. JACKSON's and class members' contracts and sales constitute an unlawful referral sale in violation of G.S. § 25A-37.

56. As a result, JACKSON and class members are entitled to a declaration that their obligations under the agreement are void and a nullity, damages (including but not limited to consideration paid), injunctive relief, and attorney's fees and costs as allowable under the Referral Sales Statute.

COUNT II
VIOLATION OF NORTH CAROLINA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT BY HOME DEPOT AND CWS

57. JACKSON re-alleges paragraphs 1 through 47 above as if set forth fully in this Count.

58. G.S. § 75-1.1 states that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

59. The purpose of G.S. § 75-1.1 was "to encourage enforcement of the act by private individuals injured by unfair trade practices."

60. HOME DEPOT and CWS's soliciting and selling of water treatment systems through home solicitations and referral sales constitutes "commerce" as defined by G.S. § 75-1.1.

61. HOME DEPOT and CWS's violation of the Referral Sales statute constitutes a *per se* violation of G.S. § 75-1.1 (see G.S. § 25A-44(4)). Moreover, HOME DEPOT and CWS violated G.S. § 75-1.1 by, inter alia, by performing precipitant tests on customers' tap water as indicative of pollution or contamination.

62. As a proximate result of HOME DEPOT and CWS's unfair and deceptive conduct, JACKSON and class members have been harmed.

63. JACKSON and class members are entitled to restitution and treble damages pursuant to G.S. § 75-16, as a remedy to HOME DEPOT and CWS's continuing pattern and practice of unfair and deceptive trade practices.

64. JACKSON and class members are also entitled to injunctive relief, and attorney's fees and costs pursuant to G.S. § 75-16.1.

PRAYER FOR RELIEF

WHEREFORE, JACKSON, individually and on behalf of all others similarly situated, prays for a judgment against the Third-Party Defendants, as follows:

a) For an order certifying the Class(es), pursuant to Rule 23 of the North Carolina Rules of Civil Procedure as provided in N.C. Gen. Stat. § 1A-1;

b) For an order appointing JACKSON as representative of the Class(es), and appointing the law firms representing JACKSON as counsel for the Class(es);

c) Enter all appropriate orders, for discovery and otherwise, consistent therewith; and

d) Enjoin the Third-Party Defendants from further violations of N.C. G. S. § 25A-37 and § 75-1.1.

DEMAND FOR A JURY TRIAL

JACKSON, on behalf of himself and all others similarly situated, hereby demands a trial by jury.

Dated: November 18, 2016

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

MEMORANDUM OF LAW IN SUPPORT OF HOME DEPOT U.S.A., INC.'S MOTION TO DISMISS IN FAVOR OF ARBITRATION

* * *

Third party plaintiff George W. Jackson[1] is bound by two separate agreements to arbitrate this dispute. The Court should therefore dismiss this lawsuit under the Federal Arbitration Act ("FAA"), and pursuant to

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[1] Although Mr. Jackson is currently labeled as "Defendant/Counter-Plaintiff" in the case caption, Citibank voluntarily dismissed the only claim against Mr. Jackson in this lawsuit, and Mr. Jackson has withdrawn his counterclaim against Citibank. As a result, the only claims remaining in this lawsuit are Mr. Jackson's putative class action claims against Home Depot and CWS. Home Depot has filed a motion to realign Mr. Jackson as a plaintiff, and Home Depot and CWS as defendants. *See* ECF Nos. 14-15.

Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Mr. Jackson purchased a water treatment system from Carolina Water Systems, Inc. ("CWS") using a Home Depot Consumer Credit Card issued by Citibank, N.A. ("Citibank"). When Mr. Jackson stopped making payments for the water treatment system, Citibank filed suit against Mr. Jackson. In response, Mr. Jackson asserted an individual counterclaim against Citibank and filed putative third party class action claims against Home Depot U.S.A., Inc. ("Home Depot") and CWS. The crux of these claims is that Home Depot and CWS allegedly violated North Carolina law by engaging in referral sales and unfair or deceptive trade practices in connection with Mr. Jackson's purchase of his water treatment system. *See generally* Answer, Affirmative Defenses, Counterclaim and Third-Party Class Action Claims (the "Complaint" or "Compl.").

Because the agreement governing Mr. Jackson's Citibank account (the "Card Agreement") requires arbitration of any counterclaim or third party claims filed by Mr. Jackson, Citibank and Home Depot moved to compel arbitration of the claims asserted in the Complaint and dismiss this lawsuit.[2] ECF Nos. 11-13, 16-18. After Citibank and Home Depot filed their motions, Mr. Jackson amended the Complaint to remove any reference to Citibank or the Citibank account he

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[2] As discussed below, CWS and Home Depot also moved to dismiss the Complaint in favor of arbitration under the agreement governing Mr. Jackson's purchase of the water treatment system from CWS (the "Purchase Agreement").

used to purchase the water treatment system. ECF No. 30 ("Amended Complaint" or "Am. Compl.").

Although Mr. Jackson has withdrawn his counterclaim against Citibank and his allegations concerning the financing of his water treatment system, all of Mr. Jackson's claims against Home Depot are still subject to arbitration under the Card Agreement, which contains a broad arbitration provision requiring individual (non-class) arbitration of all claims "relating to [Mr. Jackson's] account," including claims made "against anyone connected with" Citibank, such as Home Depot. Mr. Jackson seeks to void the Card Agreement, invalidate the accompanying debt to Citibank, and compel Home Depot to compensate Mr. Jackson for the payments he made on his Citibank account. Mr. Jackson's amended claims thus directly relate to his Citibank account and remain squarely within the definition of claims covered by the Card Agreement's arbitration provision, and Home Depot retains the right to seek enforcement of the arbitration provision as a third party beneficiary, notwithstanding Mr. Jackson's decision to withdraw his claim against Citibank.

In addition, the Purchase Agreement between CWS and Mr. Jackson provides an independent basis for dismissal of Mr. Jackson's claims in favor of arbitration. The Purchase Agreement contains a broad arbitration provision that governs "all claims, disputes and controversies arising out of or in connection with this contract." Mr. Jackson's amendment of the Complaint to remove any reference to Citibank has no effect on the applicability of the arbitration provision in the Purchase Agreement.

Courts around the country routinely enforce arbitration provisions similar to the ones at issue here, and either of the two agreements is independently sufficient to send this dispute to arbitration. The Court should therefore grant this motion and dismiss Mr. Jackson's Amended Complaint.

RELEVANT FACTUAL BACKGROUND

Mr. Jackson is the holder of a Citibank-issued Home Depot credit card account (the "Account"). *See* Baker Aff. ¶ 11 & Ex. A.[3] Although referred to as a "Home Depot Consumer Credit Card" account, "Citibank is the owner of the Account." *Id.* Mr. Jackson used this Account to finance and pay for his purchase of the water treatment system, which he alleges "was financed through Home Depot either directly through Citibank, or by subsequent assignment." *See* Compl. ¶ 24.

The Card Agreement governing the Account contains a broad arbitration agreement:

> **ARBITRATION**
>
> ***PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.*** **IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT, INCLUDING THE RIGHT TO A JURY AND THE RIGHT TO INITIATE OR PARTICIPATE**

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[3] "Baker Aff." refers to the Affidavit of Shelley R. Baker, dated May 24, 2016, originally filed in North Carolina state court, and available as an exhibit to Home Depot's brief in support of its pending motion to realign the parties. ECF Nos. 14-15.

IN A CLASS ACTION OR SIMILAR PROCEEDING. IN ARBITRATION, A DISPUTE IS RESOLVED BY AN ARBITRATOR INSTEAD OF A JUDGE OR JURY. ARBITRATION PROCEDURES ARE SIMPLER AND MORE LIMITED THAN COURT PROCEDURES.

Agreement to Arbitrate: Either you or we may, without the other's consent, elect mandatory, binding arbitration for any claim, dispute, or controversy between you and us (called "Claims").

Claims Covered

What Claims are subject to arbitration? All Claims relating to your account, a prior related account, or our relationship are subject to arbitration, including Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision. All Claims are subject to arbitration, no matter what legal theory they are based on or what remedy (damages, or injunctive or declaratory relief) they seek. This includes Claims based on contract, tort (including intentional tort), fraud, agency, your or our negligence, statutory or regulatory provisions, or any other sources of law; Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise; and Claims made independently or with other claims. A party who initiates a proceeding in court may elect arbitration with respect to any Claim advanced in that proceeding by any other party. Claims and remedies sought

as part of a class action, private attorney general or other representative action are subject to arbitration on an individual (non-class, non-representative) basis, and the arbitrator may award relief only on an individual (non-class, non-representative) basis.

Whose Claims are subject to arbitration? Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you, such as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated company, predecessor or successor, heir assignee, or trustee in bankruptcy.

* * *

Broadest Interpretation. Any questions about whether Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced. This arbitration provision is governed by the Federal Arbitration Act (the "FAA").

* * *

What about debt collections? We and anyone to whom we assign your debt will not initiate an arbitration proceeding to collect a debt from you unless you assert a Claim against us or our assignee. We and any assignee may seek arbitration on an individual basis of any Claim asserted by you, whether in arbitration or any proceeding, including in a proceeding to collect a debt.

Ryning Aff., Ex. 1 (emphasis in original).[4] The arbitration agreement makes it clear that "Claims made as counterclaims, cross-claims, third-party claims, interpleaders or otherwise" are subject to arbitration, and that "Claims made by or against anyone connected with [Citibank]" are subject to arbitration. *Id.*

The Purchase Agreement between Mr. Jackson and CWS also contains a broad arbitration provision that states: "THIS CONTRACT CONTAINS A BINDING AGREEMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUT OF OR IN CONNECTION WITH THIS CONTRACT." Blum Decl., Ex. A ¶ 5 (capitalization in original); *see also id.* ("Any controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration in Charlotte, North Carolina in accordance with the rules and laws of the State of North Carolina.").[5] By its plain language, the Purchase Agreement therefore provides that any and all claims arising out of, in connection with, or relating to Mr. Jackson's purchase of a water treatment system shall be arbitrated.

In the Amended Complaint, Mr. Jackson asserts claims against Home Depot and CWS for alleged violations of North Carolina's referral sales statute, N.C. Gen. Stat. § 25A-37 (Am. Compl. ¶¶ 48-56), and unfair and deceptive trade practices statute, N.C. Gen. Stat.

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[4] "Ryning Aff." refers to the Affidavit of Terri Ryning, dated October 18, 2016, which accompanies Citibank's motion to dismiss. ECF No. 13.

[5] "Blum Decl." refers to the Declaration of John Blum, dated October 27, 2016, which accompanies CWS's motion to dismiss. ECF No. 16-1.

§ 75-1.1 (Am. Compl. ¶¶ 57-67), based on the sale of the water treatment system. Mr. Jackson alleges that "all contracts between Jackson and HOME DEPOT, CWS, or others having anything to do with the water treatment systems at issue" are "'void and a nullity.'" Am. Compl. ¶ 5. Among other relief, Mr. Jackson seeks "damages (including but not limited to consideration paid)" under the referral sales statute and "restitution and treble damages" under the unfair and deceptive trade practices statute. Am. Compl. ¶¶ 56, 63.

LEGAL STANDARD

The FAA permits private parties to waive the judicial process, with its expense and delays, in favor of the lower cost, informality, simplicity, and speed of arbitration. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (arbitration "is usually cheaper and faster than litigation") (citation omitted). "Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 "reflect[s] both a 'liberal federal policy favoring arbitration' and the 'fundamental principle that arbitration is a matter of contract,'" such that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 339 (2011) (citations omitted).

Specifically, Section 2 of the FAA provides that a written arbitration provision in any contract involving interstate or international commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. If there are any doubts concerning a dispute's arbitrability, such doubts must be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 ("[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense...."); *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 711 (4th Cir. 2001) ("federal policy requires that ambiguities in arbitration clauses be resolved in favor of arbitration"); *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) ("we may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute'") (citation omitted).

Under the FAA, a dispute must be resolved in arbitration where (1) a binding arbitration agreement exists and (2) the dispute falls within the scope of that agreement. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-28 (1985) (endorsing this "two-step inquiry"); *Hightower v. GMRI, Inc.*, 272 F. 3d 239, 242 (4th Cir. 2001) (conducting two-step inquiry while also noting that "North Carolina has expressed strong support for utilizing arbitration to settle disputes"); *Keena v. Groupon, Inc.*, 2016 WL 3450828, at *2 (W.D.N.C. Jun. 21, 2016) (Mullen,

J.) ("This Court must compel arbitration if: '(i) the parties have entered into a valid agreement to arbitrate, and (ii) the dispute in question falls within the scope of the arbitration agreement.'") (quoting *Chorley Enter., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 563 (4th Cir. 2015)). Both requirements are met in this case.

ARGUMENT

I. THE CARD AGREEMENT REQUIRES ARBITRATION OF MR. JACKSON'S CLAIMS AGAINST HOME DEPOT.

A. The Arbitration Agreement Is Valid And Enforceable.

"To determine whether the parties agreed to arbitrate, courts apply state law principles governing contract formation." *Hightower*, 272 F. 3d at 242. The Card Agreement, which contains the applicable arbitration agreement, is expressly governed by a South Dakota choice-of-law provision. Ryning Aff., Ex. 1; *Keena v. Groupon*, 2016 WL 3450828, at *2 (applying choice of law provision and enforcing arbitration agreement). South Dakota law strongly favors arbitration. *See, e.g., Rossi Fine Jewelers, Inc. v. Gunderson*, 648 N.W.2d 812, 814 (S.D. 2002) ("We have consistently favored the resolution of disputes by arbitration . . . . If there is doubt whether a case should be resolved by traditional judicial means or by arbitration, arbitration will prevail.").[6]

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[6] Even if South Dakota or any other applicable state law did not support arbitration, "the Federal Arbitration Act favors strict

Under South Dakota law, Jackson's use of the Account constitutes his acceptance of the terms of the Card Agreement, including the arbitration agreement. *See* S.D. Codified Laws § 54-11-9 ("use of an accepted credit card or the issuance of a credit card agreement and the expiration of thirty days from the date of issuance without written notice from a card holder to cancel the account creates a binding contract between the card holder and the card issuer . . . ."); *see also Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1199 (S.D. Cal. 2013) (holding that under South Dakota law, "continued use of a credit [card] account" constitutes assent to arbitration). Indeed, numerous courts have found the same or a substantially similar Citibank arbitration agreement to be valid and enforceable. *See, e.g.*, *Drozdowski v. Citibank, Inc.*, No. 2:15-cv-2786-STA-cgc, 2016 WL 4544543, at *7 (W.D. Tenn. Aug. 31, 2016); *McCormick v. Citibank, N.A.*, No. 15-CV-46-JTC, 2016 WL 107911, at *6 (W.D.N.Y. Jan. 8, 2016); *Carr v. Citibank, N.A.*, No. 15-cv-6993

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enforcement of arbitration provisions and preempts state laws that interfere with arbitration." *Keena v. Groupon*, 2016 WL 3450828, at *7. Moreover, there can be no dispute that the parties' relationship involves interstate commerce, which is sufficient to bring it into the ambit of the FAA. *See Allied-Bruce Terminix*, 513 U.S. at 277 (holding that the FAA is extremely broad and applies to any transaction directly or indirectly affecting interstate commerce). The Complaint alleged that Mr. Jackson is a resident of North Carolina who used a credit card issued by Citibank, a New York corporation based in South Dakota, to purchase a water treatment system from Home Depot, a Delaware corporation based in Georgia, and CWS, a North Carolina corporation. Compl. ¶¶ 8-11, 20, 24, 75. Mr. Jackson repeats his allegations concerning his citizenship and the citizenship of Home Depot and CWS in the Amended Complaint, but omits any reference to Citibank. Am Compl. ¶¶10-12.

(SAS), 2015 WL 9598797, at *3 (S.D.N.Y. Dec. 23, 2015); *Clookey v. Citibank, N.A.*, No. 8:14-cv-1318, 2015 WL 8484514, at *5 (N.D.N.Y. Dec. 9, 2015). This Court should as well.

B. The Arbitration Agreement In The Card Agreement Encompasses Mr. Jackson's Claims Against Home Depot.

This entire dispute centers on Mr. Jackson's purchase of a water treatment system using the Account and therefore must be arbitrated. "To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988). Courts must respect "the FAA's command to enforce arbitration agreements" as they are written. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 n.5 (2013); *see also KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25-26 (2011) (holding that the FAA "requires courts to enforce the bargain of the parties to arbitrate" and "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (citation omitted); *AT&T Mobility*, 563 U.S. at 344 (confirming that the "'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms'") (citation omitted). Moreover, the party resisting arbitration bears the burden of showing that the arbitration agreement does not apply. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000).

Under South Dakota law, "[t]he language in a contract is given its 'plain and ordinary meaning.'" *Kozlowski v. Palmquist*, No. 4:12-CV-04174-KES, 2016 WL 1255711, at *10 (D.S.D. Mar. 29, 2016) (quoting *Am. State Bank v. Adkins*, 458 N.W.2d 807, 809 (S.D. 1990)); *see also Kleinsasser v. Weber*, 877 N.W.2d 86, 96 (S.D. 2016) ("When examining a contract, we give words their 'plain and ordinary meaning.'") (citation omitted). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. In other words, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the dispute should be sent to arbitration. *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).

In the Card Agreement, Mr. Jackson agreed to arbitrate "[a]ll Claims relating to [his] account." Ryning Aff., Ex. 1.[7] In the Complaint, Mr. Jackson alleged unfair and deceptive trade practices in connection with his purchase of a water treatment system using financing from Home Depot and Citibank. *See* Compl. ¶ 18 ("the sales representative informed Mr. Jackson that he would qualify for financing through Home Depot which offered 0% interest for 24 months..."), ¶ 24 ("Jackson's purchase was financed through Home

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[7] Moreover, in the Card Agreement, Mr. Jackson agreed to submit to arbitration threshold disputes "regarding the application, enforceability, or interpretation of [the Card Agreement] and [its] arbitration provision." *See* Ryning Aff., Ex. 1 at 5. Accordingly, there is "clear and unmistakable intent" that an arbitrator should decide the arbitrability of this dispute in the first instance. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Depot either directly through Citibank, or by subsequent assignment."); ¶ 28 (complaining of "25.99% interest rate"). Although Mr. Jackson amended the Complaint to remove any references to Citibank or the financing of his water treatment system, Mr. Jackson cannot deny that he financed the purchase with his Citibank Account, and his remaining claims relate to the Account.

In the Amended Complaint, Mr. Jackson alleges that "all contracts ... having anything to do with the water treatment systems at issue" are "'void and a nullity'" (Am. Compl. ¶ 5), and he continues to seek the return of the "consideration paid" in the transaction as well as "restitution." Am. Compl. ¶¶ 56, 63. Mr. Jackson therefore seeks to invalidate the Card Agreement and his accompanying debt to Citibank and to have Home Depot compensate him for the payments he has made on his Citibank Account. These allegations undoubtedly raise a dispute "relating to [Mr. Jackson's] account," which is all that is required under the broad arbitration provision in the Card Agreement.

Indeed, before its dismissal, Citibank also invoked the arbitration agreement because Mr. Jackson's counterclaim against Citibank was subject to arbitration. *See* ECF No. 11. Mr. Jackson's interrelated claims against Home Depot are therefore also subject to arbitration. *See, e.g.*, Compl. ¶ 75 ("Citibank is subject to all claims and defenses that Jackson has against Home Depot and CWS . . . . Therefore, Citibank is jointly and severally liable to Jackson, who financed the purchase of his water treatment system through Home Depot, which directly sold or assigned the transaction to Citibank."). Mr. Jackson's decision to withdraw his claims against Citibank does not sever

the relationship between his claims against Home Depot and his Citibank Account.

C. Home Depot May Enforce Mr. Jackson's Arbitration Obligations.

"[A] nonsignatory may enforce an arbitration agreement under a third party beneficiary theory when the parties to the agreement have agreed, upon the formation of their agreement, to confer the benefits thereof to the nonsignatory." *Geier v. m-Qube Inc.*, 824 F.3d 797, 801 (9th Cir. 2016) (quoting *Gibson v. Wal-Mart Stores, Inc.*, 181 F.3d 1163, 1170 n.3 (10th Cir. 1999)); *see also Washington Square Sec., Inc. v. Aune*, 253 F. Supp. 2d 839, 844 (W.D.N.C. 2003), *aff'd*, 385 F.3d 432 (4th Cir. 2004) (holding that third party beneficiaries could enforce arbitration provision); *Bey v. Midland Credit Mgmt., Inc.*, No. GJH-15-1329, 2016 WL 1226648, at *5 (D. Md. Mar. 23, 2016) (holding that a third party could enforce a Citibank arbitration agreement). Home Depot is just such a third-party beneficiary to the arbitration agreement here.

Under South Dakota law, a third party beneficiary exists where "[t]he terms of the contract . . . clearly express intent to benefit that party or an identifiable class of which the party is a member." *Jennings v. Rapid City Reg'l Hosp., Inc.*, 802 N.W.2d 918, 922 (S.D. 2011) (citation omitted). The arbitration agreement here expressly includes "Claims made ... against anyone connected with [Citibank]." Ryning Aff., Ex. 1. Home Depot is "connected with" Citibank because Citibank is the issuer of the Home Depot Consumer Credit Card Mr. Jackson used to finance the purchase of the water treatment system at issue. *See* Baker Aff. ¶ 11 & Ex. 1. Further, Mr. Jackson origi-

nally alleged that, together with Home Depot and CWS, "Citibank is jointly and severally liable to Jackson." Compl. ¶ 75. Mr. Jackson also alleged that Home Depot "directly sold or assigned the transaction to Citibank." *Id.*; *see also id.* ¶ 24 (alleging that "Jackson's purchase was financed through Home Depot either directly through Citibank, or by subsequent assignment"). While Mr. Jackson has withdrawn these allegations, he still seeks to have Home Depot compensate him for the amounts he paid on his Citibank Account. Am. Compl. ¶¶ 56, 63. Given this requested relief, Home Depot is "connected with" Citibank for purposes of the arbitration provision in the Card Agreement.

Mr. Jackson's Amended Complaint presents a dispute arising solely out of the purchase of a water treatment system using his Citibank-issued Home Depot credit card, a dispute that falls squarely within the scope of the arbitration provision. This entire dispute, therefore, may only be resolved by arbitration under the terms of the Card Agreement.

II. THE PURCHASE AGREEMENT REQUIRES ARBITRATION OF JACKSON'S CLAIMS AGAINST HOME DEPOT.

The Purchase Agreement between Mr. Jackson and CWS provides an independent basis for dismissing Mr. Jackson's claims in favor of arbitration. Under the arbitration provision of the Purchase Agreement, Mr. Jackson agreed "to arbitrate all claims, disputes and controversies arising out of or in connection with this contract" and that "[a]ny controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration." Blum Decl., Ex. A ¶ 5. The Purchase Agreement is governed by North

Carolina law, *id.*, which strongly favors arbitration. *See, e.g.*, *Cyclone Roofing Co. v. David M. La Fave Co.*, 321 S.E.2d 872, 876 (N.C. 1984) (describing "the strong public policy in North Carolina favoring arbitration"). "When the language of the arbitration clause is 'clear and unambiguous,' [North Carolina courts] apply the plain meaning rule to interpret its scope." *Fontana v. Southeast Anesthesiology Consultants, P.A.*, 729 S.E.2d 80, 86 (N.C. App. 2012) (citation omitted). And even if there were ambiguity, North Carolina "public policy 'requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration.'" *Register v. White*, 599 S.E.2d 549, 556 (N.C. 2004) (quoting *Johnston Cty. V. R.N. Rouse & Co.*, 414 S.E.2d 30, 32 (N.C. 1992)).

Mr. Jackson's claims against Home Depot fall squarely within the scope of his agreement to arbitrate any and all claims, disputes, and controversies arising out of, relating to, or in connection with his purchase of a water treatment system. There can be no dispute that Mr. Jackson's claims that Home Depot and CWS violated the North Carolina referral sales and deceptive trade practices statutes arise out of and relate to Mr. Jackson's agreement to purchase his water treatment system, and his allegations in support of these claims do not distinguish between Home Depot and CWS. *See* Am. Compl. ¶¶ 48-56 (claim against Home Depot and CWS for violation of referral sales statue); ¶¶ 57-64 (claim against Home Depot and CWS for violation of deceptive trade practices statute). Mr. Jackson's claims against Home Depot and CWS therefore are subject to arbitration under the Purchase Agreement.

III. THIS ACTION SHOULD BE DISMISSED BECAUSE ALL OF THE ISSUES IN IT ARE ARBITRABLE.

Because this entire lawsuit belongs in arbitration, the Court should dismiss it. In this Circuit, "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Internat'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-710 (4th Cir. 2001); *see also Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (affirming district court dismissal "on the ground that all of the issues presented in the suit were arbitrable"); *Payton v. Nordstrom, Inc.*, 462 F. Supp. 2d 706, 709 (M.D.N.C. 2006) (dismissing action where all of plaintiff's claims belonged in arbitration); *Minacca, Inc. v. Singh*, No. 3:09cv389-RJC-DCK, 2010 WL 2650877, at *4 (W.D.N.C. July 1, 2010) (same). Alternatively, under section 3 of the FAA, the Court may stay this action pending arbitration. *See* 9 U.S.C. § 3 (providing that, where a valid arbitration agreement applies, the district court shall stay the action "until such arbitration has been had in accordance with the terms of the agreement"). As described above, the arbitration agreements contained in the Card Agreement and the Purchase Agreement separately and independently encompass all of the issues in this lawsuit. The Court, therefore, should dismiss this entire action.

Respectfully submitted this 2nd day of December, 2016.

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil No. 3:16-cv-00712-GCM

GEORGE W. JACKSON, on behalf of himself and others similarly situated,
Third-Party Plaintiff,

v.

HOME DEPOT, U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

THIRD-PARTY CLASS ACTION CLAIMS

JURY TRIAL DEMANDED
INJUNCTIVE RELIEF SOUGHT

CASE REMOVED FROM
THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
MECKLENBURG COUNTY, NORTH CAROLINA,
16 CVD 1096

MOTION FOR REMAND PENDING

PLAINTIFF'S OPPOSITION TO THIRD-PART DEFENDANT HOME DEPOT U.S.A., INC.'S MOTION TO DISMISS IN FAVOR OF ARBITRATION

Third-Party Plaintiff George W. Jackson ("Mr. Jackson"), by and through undersigned counsel, hereby submits the following Opposition to Third-Party Defendant Home Depot, U.S.A., Inc.'s ("Home Depot") Motion to Dismiss in Favor of Arbitration. The Court should deny Home Depot's motion because: 1) the motion will be moot when this Court grants the pending Motion to Remand, which the Court must take up before reaching the merits of Home Depot's

motion; 2) Home Depot's contract with Mr. Jackson contains no arbitration clause; 3) the Citibank arbitration clause is not in this case, where Home Depot acknowledges it is not a party to the Citibank Cardholder Agreement; 4) the entire sales contract is a nullity, and there is therefore no arbitration clause in any contract to enforce, and; 5) the Carolina Water Systems arbitration clause is void and unenforceable as unconscionable, and because it was procured via fraud by omission.

BACKGROUND

Mr. Jackson was initially sued by Citibank NA ("Citibank") to collect an allegedly outstanding debt for a water filtration system purchased by Jackson from Home Depot and Third-Party Defendant Carolina Water Systems ("CWS"). Mr. Jackson timely answered and asserted a Third-Party class action complaint on August 26, 2016, alleging that Home Depot and CWS had a fraudulent and misleading scheme of misleading customers about the alleged dangerousness of their water and subsequently selling them unnecessary water filtration systems. Mr. Jackson further alleged that the scheme employed by Home Depot and CWS was an illegal and impermissible referral sales scheme. Mr. Jackson initially included Citibank in the class action complaint, by asserting affirmative defenses against Citibank for Truth in Lending Act Violations, and also asserting a separate count for Holder Rule liability. Notably, Count III was the only count of the original complaint alleged against Citibank, and was alleged against Citibank only. Counts I and II, alleged violations of the North Carolina Referral Sales Statute and the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), against

Home Depot and CWS. Citibank was never included in those counts. *See* D.E. 1-1, Pages 16-19.

In the face of the class action complaint, Citibank voluntarily dismissed its lawsuit without prejudice against Jackson on September, 23 2016. Shortly thereafter on October 12, 2016, Home Depot removed the case to federal court. Mr. Jackson filed his Motion to Remand, and Citibank, Home Depot, and CWS all filed motions to dismiss in favor of arbitration.

Subsequent to the various arbitration motions being filed, on November 18, 2016, Mr. Jackson filed his First Amended Third-Party Class Action Complaint ("Amended Complaint"), D.E. Number 30. The Amended Complaint dropped the affirmative defenses against Citibank, as these defenses were mooted by Citibank's voluntary dismissal. Mr. Jackson also dropped his counterclaim for Holder Rule liability against Citibank (Count III) from the Amended Complaint. Mr. Jackson eliminated all references to Citibank, the credit card transaction, and the financing of the sales contract from the class action complaint. Currently, Plaintiff has no pending claim against Citibank, or that implicates Citibank's Cardholder Agreement. Nowhere in the Amended Complaint can the word "Citibank" be found. The Amended Complaint is now the operative complaint in this case.

The express claims that Mr. Jackson alleges in the Amended Complaint are the original Counts I and II only – a claim for violation of the North Carolina Referral Sales Statute, and a second claim for violation of the Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"). *See* D.E. Pages 10-13. These claims are alleged against Home Depot and CWS only. *Id.* The underlying facts asserted in the Amended

Complaint that support these two claims all relate to conduct that occurred *prior* to the financing of the transaction. *Id.* at Pages 4-8, ¶¶ 14-38. The only supporting document to the Amended Complaint is the Home Depot Home Improvement Agreement, D.E. 30-1.

After the Amended Complaint was filed, both Home Depot and CWS recognized the well-established principle that the filing of an amended complaint rendered their pending motions to dismiss moot. Both Home Depot and CWS re-filed their motions, and it is Home Depot's refiled Motion to Dismiss (D.E. 32) that comes now before this Court.

STATEMENT OF FACTS PERTINENT TO THIS MOTION

There are 2 separate contracts at issue. One contract is the 3 page CWS Purchase Agreement dated 7/24/2014, attached to CWS's Motion to Dismiss (D.E. 16-1). The second contract is Home Depot's 13-page Home Improvement Agreement dated 8/6/14, attached to the First Amended Third-Party Complaint as Exhibit A.

The 13-page Home Depot contract is very detailed. There is a Definitions section that identifies the parties to the contract as "You and Home Depot U.S.A., Inc." Exhibit A, Page 3 of 13. Notably, the Home Depot contract contains this merger clause:

> You understand this Agreement constitutes the entire understanding between You and Home Depot and may only be amended by a Change Order signed by Home Depot (or by Installation Professional or its authorized representative on Home Depot's behalf) and You. This Agreement expressly supersedes all

> prior written or verbal agreements or representations made by Home Depot, Installation Professional, You, or anyone else. Except as set forth in this Agreement, You agree there are no oral or written representations or inducements, express or implied, in any way conditioning this Agreement, and You expressly disclaim their existence.

The General Provisions page, Page 4 of 13, contains sections covering a wide array of topics, including without limitation Scope, Professional's Responsibilities, Your Responsibilities, Changes and Change Orders, Limited Warranty, Cancellation, Termination, and Returns. Notably, there is no arbitration clause in the Home Depot contract.

The Home Depot contract is indisputably a contract for both the water treatment system and the installation thereof. The cost listed on Page 3 of 13 is $8990.00, which is the cost of the water treatment system. That same page contains a provision for the customer to initial, authorizing "delivery of merchandise." On Page 7 of 13, the first words on that page are "The water treatment equipment quoted in this contract." That same page has a large section entitled "Specifications," where the "Equipment Information" is set forth, and lists 1 Water Conditioning System, 1 Household Filtration System, 1 Drinking Water System, and 1 Airmaster. Also, the Cancellation Provision on Page 9 of 13 references "any goods delivered to you under the contract or sale."

The CWS arbitration clause was intentionally and expressly not made a part of the Home Depot contract. Home Depot added one of the three pages of the CWS Purchase Agreement to its contract, and that page is

now Page 12 of 13 of Exhibit A. The page of the CWS Purchase Agreement that was added to the Home Depot contract is the Notice of Cancellation page of the CWS Purchase Agreement. That page does not include the arbitration clause. The fact that Home Depot added one of the three pages of the CWS Purchase Agreement to its contract, and did not add the other two pages, is evidence of Home Depot's intent to omit those other two pages. And it is one of the intentionally omitted two pages of the CWS Purchase Agreement that contains the arbitration clause.

ARGUMENT

1. Case law dictates that the Court should take up Mr. Jackson's Remand Motion first, and not reach this motion until remand is decided.

A critical preliminary question for this Court is the order in which it will address two of the currently pending motions – Plaintiff's Motion to Remand (D.E. 23) and Defendant's Home Depot's Motion to Dismiss (D.E. 32). Case law demonstrates that district courts across the country address remand motions first, and then will turn to dispositive motions if and only if the remand motion is denied. The reasons for this are obvious and dictated by both law and common sense. Federal courts are courts of limited jurisdiction. If a federal court lacks jurisdiction over a case, it may not decide the substantive issues in that case:

> The existence of subject matter jurisdiction is a threshold issue, and any case lacking a proper basis for subject matter jurisdiction must be dismissed. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 96, 118 S.Ct. 1003,

> 140 L.Ed.2d 210 (1998). Accord *Jones v. American Postal Workers Union*, 192 F.3d 417, 422 (4th Cir.1999); and *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir.1999). In other words, it is well established that "[t]he subject matter jurisdiction of federal courts is limited and the federal courts may exercise only that jurisdiction which Congress has prescribed." *Chris v. Tenet*, 221 F.3d 648, 655 (4th Cir.2000), citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). Accord *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 186 (4th Cir.2002). The requirements are so absolute that "[n]o party need assert [a lack of complete diversity or the requisite amount in controversy]. No party can waive the defect, or consent to jurisdiction. No court can ignore the defect; rather a court, noticing the defect, must raise the matter on its own." *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) (internal citations omitted). Accord *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

TC Arrowpoint, L.P. v. Choate Const. Co., No. 3:05CV267-H, 2005 WL 2148934, at *2 (W.D.N.C. Sept. 7, 2005). Plaintiff's Motion to Remand asserts that this Court lacks subject matter jurisdiction under 28 U.S.C. § 1332(d). If that Motion to Remand is granted, it would be an acknowledgment by this Court that it has no jurisdiction over this case. And the Court must have

subject matter jurisdiction to order arbitration under the Federal Arbitration Act:

> Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. *E.g., Commercial Metals Co. v. Balfour, Guthrie, & Co.*, 577 F.2d 264, 268-269 (CA5 1978), and cases cited.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 34, 103 S. Ct. 927, 947, 74 L. Ed. 2d 765 (1983).

This is why the Motion to Remand must be taken up and decided prior to looking at the merits of Defendant Home Depot's Motion to Dismiss here. This principle was plainly and clearly articulated by the court in *Socoloff v. LRN Corp.*, No. CV 13-4910-CAS AGRX, 2013 WL 4479010 (C.D. Cal. Aug. 19, 2013), where the court had before it both a motion to remand and a motion to compel arbitration and found it must take up remand first because subject matter jurisdiction is needed to hear the arbitration motion:

> Because this Court requires subject matter jurisdiction in order to hear defendant's motion to compel arbitration, the Court first turns to plaintiff's motion to remand this action to state court.

Socoloff, 2013 WL 4479010, at *2.

In *Niami v. Fed. Exp. Print Servs., Inc.*, No. C 09-4384 JF, 2010 WL 958045 (N.D. Cal. Mar. 12, 2010), the court had before it a motion to remand for lack of

diversity jurisdiction, and a motion to compel arbitration and dismiss. The court analyzed and ruled on the motion to remand first, and then found the motion to compel arbitration moot due to the absence of federal jurisdiction: "Defendants' motion to compel arbitration is moot based on the absence of federal jurisdiction." *Niami,* 2010 WL 958045 at *7. A motion to compel arbitration and to dismiss was similarly mooted by a successful motion to remand in *Diego v. Golden Valley Health Centers*, No. 1:15-CV-00085-JAM, 2015 WL 4112276 (E.D. Cal. July 8, 2015) (plaintiff sought a stipulation to delay briefing on motion to compel arbitration until after a ruling on remand request, which would render arbitration motion moot.) *Diego,* 2015 WL 4112276, at *1.

The principle that the motion to remand is taken up first can even be seen in cases where the motion to remand is denied. In *Terrell Indep. Sch. Dist. v. Benesight, Inc.*, No. CIV.A. 301CV1834G, 2001 WL 1636418 (N.D. Tex. Dec. 18, 2001), the court analyzed and denied the motion to remand, and then turned to the motion to compel arbitration ("[h]aving disposed of Terrell's motion to remand, the only remaining motion before the court is Benesight's motion to compel arbitration." *Terrell,* 2001 WL 1636418, at *5); see also *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp. 2d 1327, 1329 (S.D. Fla. 2003) (court analyzed plaintiff's six arguments in motion to remand prior to determining motion to compel arbitration).

Plaintiff has forcefully argued that this Court lacks subject matter jurisdiction, where the CAFA $5 million amount in controversy has not been shown, and cannot be shown. Plaintiff also argues that this case is covered by the Local Controversy exception to

CAFA jurisdiction which requires remand. This Court must take up the Motion to Remand first, and determine whether subject matter jurisdiction exists. Since this Court lacks jurisdiction, the Court need not even analyze the merits of Home Depot's Motion to Dismiss.

2. Home Depot's contract with Mr. Jackson contains no arbitration clause to enforce.

If this Court finds it has subject matter jurisdiction over this case and turns to the merits of Home Depot's motion to dismiss, the facts of this case dictate that the Court deny Home Depot's motion for a very simple reason – the contract between **Home Depot and Mr. Jackson contains no arbitration clause to enforce**.

Even a cursory review of Home Depot's contract with Mr. Jackson shows that it contains no arbitration clause. Further proving this point is that Home Depot does not, and cannot, point to such an arbitration clause in the instant motion, but instead attempts to rely upon the CWS and Citibank arbitration clauses. Home Depot is the author of its Home Improvement Agreement and could have inserted an arbitration clause, but it chose not to do so. Because the only contract between Mr. Jackson and Home Depot does not contain an arbitration clause, forcing Jackson to arbitrate his claims against Home Depot would be contrary to basic contract principles.

Despite Home Depot's herculean efforts to invoke the separate Citibank Cardholder Agreement, that contract and its arbitration clause are not in this case under the plain language of the operative complaint. The Home Depot contract plainly states in at least 3

separate places (first on Page 3 of 13, and then twice more on Page 4 of 14) that the Citibank Cardholder Agreement is a "separate" agreement, to which Home Depot is "NOT" a party. How Mr. Jackson paid for or financed the purchase of the water treatment system is irrelevant to the claims asserted in the Amended Complaint against Home Depot.

As for the CWS Purchase Agreement, Home Depot is not a party to that contract, nor was the CWS contract explicitly or implicitly incorporated into the Home Depot contract. In fact, Home Depot went out of its way to not include the CWS arbitration provision into its Agreement. Exhibit A to the Amended Complaint is the Customer Copy of the Home Depot Home Improvement Agreement. Home Depot added one of three pages of the CWS Purchase Agreement to its contract, and intentionally did not add the other two pages, including the page containing the arbitration clause. Home Depot certainly can't rely upon a clause that it went out of its way not to include.

Also, there is nothing in the Home Depot Home Improvement Agreement, dated 8/6/14, that states that the entire CWS Sales Contract dated 7/24/14 is incorporated therein, or that CWS was acting as Home Depot's agent, or that CWS is a party to the Home Depot Home Improvement Agreement. Instead, Home Depot explicitly defined the parties as Home Depot and Mr. Jackson. Home Depot's merger clause unambiguously states that its 13-page contract is the "entire understanding" between Home Depot and Mr. Jackson. Home Depot's merger clause expressly states that the 13-page agreement "supersedes all prior written or verbal agreements made by Home Depot, Installation Professional, You [Mr. Jackson], or **anyone else.**"

(emphasis added) Moreover, Home Depot was a not a party to the CWS contract.

Where Home Depot's contract with Mr. Jackson contains no arbitration provision, there is not only no reason to refer Jackson's claims against Home Depot to arbitration, there is no good faith basis for filing the instant motion. Neither Citibank nor CWS's arbitration provisions save Home Depot, or provide a good faith basis for the motion to refer the claims against Home Depot, arising from its Home Improvement Agreement, to arbitration. Home Depot's position on this critical issue can be effectively characterized as silence. Other than nakedly averring in a conclusory fashion that the claims don't distinguish between Home Depot and CWS, Home Depot makes no showing or argument as to why it may avail itself of another party's arbitration provision in a contract to which it is not a party. And, unlike the extremely broad Citibank arbitration clause, which expressly brings within its ambit "anyone connected with [Citibank]," the CWS arbitration provision only covers disputes between the "parties" to the CWS contract, who are the "Buyer" (Mr. Jackson) and the "Seller" (CWS). As Home Depot itself notes, "When the language of the arbitration clause is 'clear and unambiguous,' [North Carolina courts] apply the plain meaning rule to interpret its scope." *Fontana v. Southeast Anesthesiology Consultants, P.A.*, 729 S.E.2d 80, 86 (N.C. App. 2012) (citation omitted). The CWS arbitration clause is clear and unambiguous in that it only covers the "parties" – Mr. Jackson and CWS. In the absence of any arbitration clause in the Home Depot Home Improvement Agreement contract, and where Home Depot acted

with intention to not incorporate the CWS arbitration clause, the Court must deny the motion to dismiss.

3. The Citibank arbitration clause is not in this case.

A shorthand summary of the Amended Complaint is that the document takes Citibank out of the case entirely. Citibank already dismissed its first-party claims against Plaintiff. Now, Plaintiff has done away with its Holder Rule claim against Citibank. There is no reference to Citibank or the financing obtained through Citibank in the Amended Complaint.

Along with eliminating Citibank as a party, Plaintiff also removed Citibank's Cardholder Agreement entirely from the case. The Citibank financing agreement, as embodied in the Cardholder Agreement, was always ancillary to Plaintiff's primary claims of violating the North Carolina Referral Sales Statute and North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), the violations of which exist without reference to how Plaintiff financed the transaction. If Plaintiff had paid cash for the water treatment system, and there was no financing at all, Home Depot still would be in violation of both the Referral Sales Statute and UDTPA. All claims of an illegal referral scheme relate to conduct that occurred prior to the financing, and Citibank was not involved. The Referral Sales Statute and UDTPA claims were always asserted against Home Depot and CWS only – Citibank was never charged with violation of these North Carolina statutes. Just like any other purchase made on a credit card, the arbitration clause contained therein only applies to claims involving the financing and not to the underlying purchases.

Despite making some minor changes to its Motion to Dismiss to address the effects of the Amended Complaint, Home Depot's invocation of the Citibank arbitration provision is still based entirely upon paragraphs of the original Complaint, paragraphs that have been removed from the Amended Complaint. There is no allegation about financing (former ¶ 18 and ¶ 24), no allegation about rates of interest (former ¶ 18 and ¶ 28), and no allegation that claims against Citibank are interrelated (former ¶ 75) in the Amended Complaint, which is now indisputably the operative complaint in this case. Yet inexplicably, and in a patent attempt to bootstrap into the Citibank arbitration provision, Home Depot still cites those very paragraphs in its motion to dismiss. See Home Depot's Motion to Dismiss at Pages 12-13. Despite the fact that the word "Citibank" does not even appear in the Amended Complaint, Home Depot continues to predicate its argument that it may avail itself of the Citibank arbitration clause. Home Depot may not piggyback on Citibank when all claims by and against Citibank have been dismissed from this case.

Home Depot makes a number of unsupported and erroneous statements about the relief that Third-Party Plaintiff is seeking in an attempt to pull the Citibank Agreement back into this litigation. Home Depot asserts, without any citation or attribution, that "Mr. Jackson seeks to void the Card Agreement, invalidate the accompanying debt to Citibank, and compel Home Depot to compensate Mr. Jackson for the payments he made on his Citibank account." Home Depot's Motion to Dismiss at Page 2. None of this is true, and none of this can be found in the Amended Complaint. Nowhere in the operative Complaint is there any claim that Mr.

Jackson seeks to "void the Card Agreement." Home Depot can't point to any part of the Amended Complaint where Mr. Jackson seeks this relief, because it isn't anywhere in the operative complaint. Instead, the Amended Complaint plainly asserts that the North Carolina Referral Statute makes the entire purchase contract void and a nullity. The fact that Home Depot may have to pay to put Plaintiff and the class back in the position they were in before they entered into the referral contract does not equate to triggering Citibank liability. At the conclusion of this lawsuit, it may very well be the case that Mr. Jackson still has an open Home Depot credit card account serviced by Citibank. Second, it is equally false for Home Depot to assert that Mr. Jackson seeks to "invalidate the accompanying debt to Citibank" and to "compel Home Depot to compensate Mr. Jackson for the payments he made on his Citibank account." Again, neither of these claims exist in the operative Amended Complaint. This lawsuit simply doesn't seek a direct invalidation of any alleged debt to Citibank, nor does it seek any restitution from Citibank. The claims that exist only exist between Plaintiff, Home Depot, and Carolina Water Systems. While the relief actually sought by the plain and unambiguous language of the Amended Complaint might ultimately have that practical effect, it would only be as a result of a multistep process of unwinding this unfair, deceptive, and illegal referral sales scheme. First, if Mr. Jackson was successful on his claims in this lawsuit, the entire sales contract between Mr. Jackson and Home Depot would be deemed a nullity. Second, if the sales contract was deemed a nullity, the remedy would be to put the parties to that contract (Mr. Jackson and Home Depot) back in the positions they were in prior to the contract. This would

have the practical effect of cancelling the underlying obligation and returning the water equipment. It would also have the effect of obligating Home Depot, not Citibank, to make restitution to Mr. Jackson. Regardless, the relief sought in this lawsuit could neither directly invalidate any alleged debt to Citibank, nor would it empower Mr. Jackson to obtain restitution from Citibank for payments made on the credit card account. Simply stated, when Citibank dropped its claims against Jackson and Jackson dropped his claim against Citibank, the Cardholder Agreement and its corresponding arbitration clause also dropped from this case.

Desperate to avoid liability in open court, Home Depot also makes the rather astonishing allegation that "Citibank is jointly and severally liable to Jackson" as a result of its financing agreement. Home Depot's Motion to Dismiss at Page 13. This is entirely pretextual, and a patent attempt to cling on to an arbitration provision that is unequivocally not in this case. If Home Depot's allegation of joint and several liability is anything less than wholly disingenuous, surely Home Depot will be filing its own third-party complaint against Citibank at any time. The Court should not hold its breath waiting for that to occur.

Home Depot is correct in stating that "Mr. Jackson's decision to withdraw his claims against Citibank does not sever the relationship between his claims against Home Depot and his Citibank Account." *Id.* But that is because there was no need to sever those claims in the first place – the claims were always entirely separate, as the Referral Sales Act and UDTPA claims were asserted against Home Depot and CWS only, and the Holder Rule claim was asserted against

Citibank only and in defense to Citibank's allegations. The various claims were all based upon multiple contracts, none of which are integrated with one another. The plain language of Home Depot's own contract (its Home Improvement Agreement) states that the Citibank Cardholder Agreement is separate in at least 3 places:

> **"Your separate cardholder agreement (to which Home Depot is NOT a party) . . ."**

See Exhibit A to First Amended Third-Party Complaint, Pages 3 of 13 and 4 of 13. There is no allegation in the Amended Complaint that there is any interrelation between the Citibank Cardholder Agreement and the Home Depot Home Improvement Agreement. The financing is entirely separate from the purchase, and the two are not dependent upon one another. Mr. Jackson could have paid cash, or used a home equity loan, or could have borrowed money from a friend. The Citibank financing is incidental to and separate from the sales contract. For example, if a dry cleaner damages a suit and the customer sues for damages, the fact that customer paid by credit card does not give the dry cleaner the ability to trigger the arbitration clause in the Cardholder Agreement. As here, the arbitration clause in the Cardholder Agreement is only an agreement to arbitrate disputes between the bank and the debtor. Here, Home Depot is in the same shoes as the dry cleaner and has no ability to hide behind Citibank's Cardholder Agreement. Once Citibank and Mr. Jackson dropped claims against one another, that Cardholder Agreement, and its arbitration clause, no longer apply.

To the extent that Home Depot's motion relies upon the Citibank arbitration clause as the basis for

referral to arbitration and subsequent dismissal, all those parts of Home Depot's motion are moot as a result of the filing of the Amended Complaint.

4. Under North Carolina law, Home Depot's entire sales contract is a nullity, and there is therefore no arbitration clause to enforce.

Even if Home Depot could somehow establish that it is covered by the CWS arbitration clause, both sales contracts (CWS and Home Depot) are void and a nullity under North Carolina law. Therefore, there is no agreement at all and certainly no agreement to arbitrate. he Amended Complaint sets out with particularity an allegation that Home Depot violated North Carolina's Referral Sales Statute, N.C.G.S § 25A-37. In support of this allegation, Third-Party Plaintiff attached the Home Depot Home Improvement Agreement to the Amended Complaint as Exhibit A. The first page of Exhibit A states on its face: "6 referrals purchase gets his system free."

"North Carolina's Referral Sales Statute specifically prohibits this conduct and nullifies all contracts that include referral programs:

> The advertisement for sale or the actual sale of any goods or services (whether or not a consumer credit sale) at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, or the procurement of sales to persons suggested by the purchaser, is declared to be unlawful. **Any obligation of a buyer arising under such a sale shall be**

> **void and a nullity** and a buyer shall be entitled to recover from the seller any consideration paid to the seller upon tender to the seller of any tangible consumer goods made the basis of the sale.

G.S. § 25A-37 (emphasis added).

For purposes of a motion to dismiss, the court construes plaintiff's allegations in the light most favorable to plaintiff, and all well-pleaded allegations of the complaint are accepted as true:

> In evaluating motions to dismiss, the court must construe the complaint's factual allegations "in the light most favorable to the plaintiff" and "must accept as true all well-pleaded allegations." *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir.1994).

Johnson v. N. Carolina, 905 F. Supp. 2d 712, 718 (W.D.N.C. 2012). But this case goes even further than that – here, there is no fact in controversy that Home Depot's sales contract (aka the Home Improvement Agreement) violates G.S. § 25A-37, where the contract on its face shows the illegal referral scheme, rendering this sales contract a nullity under N.C. law.

A "nullity" is distinguishable from contracts that are merely "void" or "voidable." In a wide variety of judicial contexts, in North Carolina courts and in courts across the country, a "nullity" means that the entire contract never existed. "A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exceptions." *Carpenter v. Carpenter*, 93 S.E.2d 617, 632, 244 N.C. 286, 304 (N.C. 1956) (quoting *City of Monroe v. Niven*, 221 N.C. 362, 20 S.E.2d 311, 312 (N.C. 1942). "A void contract is no

contract at all; it binds no one and is a mere nullity." *Primerica Life Ins. Co. v. James Massengill & Sons Const. Co.*, 712 S.E.2d 670, 679, 211 N.C.App. 252, 263 (N.C.App.,2011) (quoting *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 511 (1968)).[1]

In *Carpenter, supra*, the North Carolina Supreme Court gave a primer on nullity:

> It is well established law that a void judgment is no judgment, is a nullity without life or force, no rights can be based thereon, and it can be attacked collaterally by any one whose rights are adversely affected by it. *Reid v. Bristol*, 241 N.C. 699, 86 S.E.2d 417; *304 *Casey v. Barker*, 219 N.C. 465, 14 S.E.2d 429; *Dunn v. Wilson*, 210 N.C. 493, 187 S.E. 802. . . .
>
> In *City of Monroe v. Niven*, 221 N.C. 362, 20 S.E.2d 311, 312, Barnhill, J., (now C. J.) said for the Court: A void judgment may 'be disregarded and treated as a nullity everywhere. It is *coram non judice*.' Further on in the opinion it is said: "A nullity is a nullity, and out of nothing nothing comes.' * * * ' The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid."
>
> Stacy, C. J., said for the Court in *Harrell v. Welstead*, 206 N.C. 817, 175 S.E. 283; "But a

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[1] An apt analogy to the distinction between void and a nullity would be the difference between divorce and annulment. A divorce voids a marriage contract, while an annulment renders it a nullity, having never existed.

> void judgment is no judgment, and may always be treated as a nullity.'

Carpenter, 244 N.C. at 303-04, 93 S.E.2d at 632. In *Laurel Valley Watch, Inc. v. Mountain Enterprises of Wolf Ridge, LLC*, 192 N.C.App. 391, 665 S.E.2d 561 (2008), the court wrote: "Furthermore, a universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Id.* at 404, 665 S.E.2d at 570. The central point of all of these cases is that a contract that is a "nullity" is one that never existed, as opposed to being a contract that existed but is unenforceable or "void."

Courts in other jurisdictions have echoed this concept of nullity meaning "never existed." In *Davis v. Parker*, 58 F.3d 183 (5th Cir. 1995), the Fifth Circuit wrote:

> The most prominent feature of an action for nullity is the relief it permits: the contract is declared null and deemed never to have existed.

Davis, 58 F.3d at 190. In Virginia, federal courts have stated that legal nullity means that there is no valid instrument, with no legal force or effect.

> However, [plaintiff] Meth does not dispute that a document, once struck, has no legal force or effect. See *Moore v. COSI, Inc.*, No. 1:11–cv–1393 (GBL/TCB), 2012 WL 1410052, at *2-3 (E.D.Va. Apr. 20, 2012) (finding under Virginia law that a Complaint was a legal nullity and could not be amended because amendment presupposes a valid instrument). As such, a notice of consent to sue that is a legal nullity cannot have tolled the statute of

> limitations. See *Ozbay v. Eli Lilly & Co.*, No. 1:08CV227 (LMB/TCB), 2008 WL 895776, at *2-3 (E.D.Va. Apr. 2, 2008) (finding that a motion for judgment that was a legal nullity could not toll the statute of limitations period).

Meth v. Natus Medical Inc., 2014 WL 3544989, at *3 (E.D.Va.,2014).

In Louisiana, courts rely upon the Louisiana Civil Code to establish the principles that an absolutely null contract is treated as if it were never made, and the parties are restored to the positions they were in before the contract was entered into:

> In Louisiana, lawful cause is a required element for formation of a valid contract. La. Civ.Code art.1966. A contract that lacks lawful cause is an absolute nullity, meaning that it cannot be confirmed by the parties. La. Civ.Code arts. 29, 30. An absolutely null contract is treated as if it were never made, and the parties are restored to the positions they occupied before the contract. La. Civ.Code art.2033. Cause is defined as "the reason why a party obligates himself." La. Civ.Code art.1967. The cause of an obligation is unlawful when enforcement of the obligation would result in a violation of a law or public policy. La. Civ.Code art.1968.

Lowery v. Divorce Source, Inc., 2015 WL 5321758, at *2 (E.D.La.,2015). The plain and ordinary meaning of "nullity" is "never existed."

Basic principles of statutory construction dictate that "nullity" in the North Carolina Referral Sales

Statute be given its plain and ordinary meaning, to ensure that the legislative intent is accomplished:

> As our Supreme Court has emphasized, when construing a statute, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Elec. Supply Co. of Durham, Inc. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). In performing this function, "[l]egislative purpose is first ascertained from the plain words of the statute." Id. See also *O & M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 267-68, 624 S.E.2d 345, 348 (2006) ("The first consideration in determining legislative intent is the words chosen by the legislature."). When the words are unambiguous, "they are to be given their plain and ordinary meanings." *Id.* at 268, 624 S.E.2d at 348.

State v. Rawls, 207 N.C. App. 415, 419, 700 S.E.2d 112, 115 (2010).

The distinction between a claim that a contract is "void" versus one that is a "nullity" is a critical one for purposes of determining whether this Court or an arbitrator should consider Mr. Jackson's challenge to the sales contract, including its arbitration clause. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S. Ct. 1204, 1210, 163 L. Ed. 2d 1038 (2006), the Court held that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye*, 546 U.S. at 449, 126 S. Ct. at 1210. The Supreme Court found that since an arbitration provision was severable from the remainder of the contract, challenges to the entire contract based upon voidness or voidability

were for the arbitrator to consider, and not the courts. *Buckeye*, 546 U.S. at 446.

But, as the Second Circuit found in *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009):

> *Buckeye* expressly limited its holding to challenges to a "contract's validity," as distinguished "from the issue whether any agreement between the alleged obligor and obligee was ever concluded," including, as relevant to this appeal, "whether the signor lacked authority to commit the alleged principal." Id. at 444 n. 1, 126 S.Ct. 1204.

Telenor, 584 F.3d at 406.

Here, the contract's validity, or the arbitration clause's severability, are not the issues. Mr. Jackson does not claim that the contract is invalid or unenforceable – his position is that the contract *never existed* at all. There is no "remainder of the contract" to enforce because, unlike the situation in *Buckeye* which only voided portions of an otherwise binding contract, the entire agreement here is a "nullity" which is, by definition, to be treated as it were never made and the parties are restored to the positions occupied before the contract was entered into. Mr. Jackson has provided the Court with evidence of the sales contract's nullity, in the form of the plain language of the Home Depot Home Improvement Agreement itself stating "6 referrals purchase gets his system free." Because there is no contract, and never was, there is no arbitration provision to enforce. Neither *Buckeye* nor its progeny reach a contrary result.

Even if the CWS arbitration clause were found to be enforceable, it cannot and does not apply to Home Depot because Home Depot is not a party to the CWS contract. Also, as shown above, Home Depot intentionally did not include any arbitration clause in its contract. For all these reasons, Home Depot's motion to compel arbitration must be denied.

5. The CWS arbitration clause is void as being procured by fraud by omission, and due to unconscionability.

The only arbitration clause in this case is the CWS arbitration clause, and this clause is the only arbitration clause upon which Home Depot may even potentially make a claim for referral to arbitration. However, the CWS arbitration clause only applies to "parties" to the contract as set forth above, and Home Depot is not a party and therefore cannot enforce the CWS arbitration clause. Even if it were able to do so, the CWS arbitration clause is void because (1) it was procured via fraud by omission, (2) it is both procedurally and substantively unconscionable, and; (3) it provides no basis for referral to arbitration.

The CWS Purchase Agreement arbitration clause reads as follows:

> **5. GOVERNING LAW, ARBITRATION AND FORUM SELECTION:** NOTICE OF ARBITRATION: THIS CONTRACT CONTAINS A BINDING ARGREEMENT TO ARBITRATE ALL CLAIMS, DISPUTES AND CONTROVERSIES ARISING OUR OF OR IN CONNECTION WITH THIS CONTRACT. This Agreement and the parties' performance under it are governed by the laws of the State

> of North Carolina. Any controversy, claim or dispute arising out of or relating to this Agreement shall be submitted to arbitration in Charlotte, North Carolina in accordance with the rules and laws of the State of North Carolina. Judgment upon any award rendered by the arbitrator(s) may be entered in any North Carolina State Court having jurisdiction thereof. Buyer irrevocably consents to and confers personal jurisdiction upon the courts of the State of North Carolina, and waives any objections to the venue of such courts, and agrees that service of process may be made on Buyer by mailing a copy of the summons and complaint by registered or certified mail, receipt requested, to Buyer's address as listed on the Agreement or such other address as Buyer shall hereafter provide in writing. Each party shall be responsible for its share of arbitration fees in accordance with the applicable Rules of Arbitration. In the event a party fails to proceed with arbitration, unsuccessfully challenges the arbitrator's award, or fails to comply with the arbitrator's award, the other party is entitled to costs of suit, including reasonable attorney's fees for having to compel arbitration or defend or enforce the award.

Based upon information and belief and the CWS form contract on its face, this is a boilerplate arbitration clause that CWS inserts into all of its sales contracts.

The Federal Arbitration Act ("FAA") reflects the fundamental principle that arbitration is a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561

U.S. 63, 68 130 S.Ct. 2772 (2010). The U.S. Supreme Court in *Rent-A-Center* went on to discuss the circumstances under which an arbitration clause would be invalidated:

> Section 2, the "primary substantive provision of the Act," *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), provides:
>
> > "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
>
> The FAA thereby places arbitration agreements on an equal footing with other contracts, *Buckeye*, supra, at 443, 126 S.Ct. 1204, and requires courts to enforce them according to their terms, *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Like other contracts, however, they may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996).

Rent-a-Center, 561 U.S. at 68. The U.S. Supreme Court in *Rent-A-Center* went on to hold that challenges to an arbitration clause are matters for the court, not the arbitrator, to consider:

> But that agreements to arbitrate are severable does not mean that they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4. In *Prima Paint*, for example, if the claim had been "fraud in the inducement of the arbitration clause itself," then the court would have considered it. 388 U.S., at 403-404, 87 S.Ct. 1801. "To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract," id., at 404, n. 12, 87 S.Ct. 1801.

Rent-A-Center, 561 U.S. at 71.

The same principle (that the courts will hear direct challenges to an arbitration clause) holds under North Carolina law. If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists. See N.C.G.S. § 1-567.3 (2001). "The question of whether a dispute is subject to arbitration is an issue for judicial determination." *Raspet v. Buck*, 147 N.C.App. 133, 136, 554 S.E.2d 676, 678 (2001) (citing *AT & T Technologies v. Communications Workers*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986)). This determination involves a two-step analysis requiring the trial court to "ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether 'the specific dispute falls within the substantive scope of that agreement.' " *Raspet*, 147

N.C.App. at 136, 554 S.E.2d at 678 (quoting *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir.1990)).

The N.C. Supreme Court laid out the analysis used to determine unconscionability in *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 655 S.E.2d 362 (2008):

> A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. See *Martin v. Sheffer*, 102 N.C.App. 802, 805, 403 S.E.2d 555, 557 (1991); see also 1 James J. White & Robert S. Summers, Uniform Commercial Code § 4-7, at 315 (5th ed.2006) [hereinafter White & Summers] ("Most courts take a 'balancing approach' to the unconscionability question, and ... seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability.")

Tillman, 362 N.C. at 102, 655 S.E.2d at 370. The *Tillman* court went on to further describe both procedural and substantive unconscionability:

> According to *Rite Color Chemical Co.*, procedural unconscionability involves "bargaining naughtiness" in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power. 105 N.C.App. at 20, 411 S.E.2d at 648. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms. *Id.* at 20, 411 S.E.2d at 648-49. Of course, unconscionability is ultimately "a determination to be made in light of a variety of factors not unifiable into a formula." White & Summers, § 4-3, at 296

> (emphasis omitted). Therefore, we note that while the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa. See *Tacoma Boatbuilding Co. v. Delta Fishing Co.*, 28 U.C.C. Rep. Serv. (CBC) 26, 37 n. 20 (W.D.Wash.1980) ("[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less 'bargaining naughtiness' that is required to establish unconscionability.").

Id. at 102-03, 655 S.E.2d at 370.

In order show procedural unconscionability, Mr. Jackson avers that the bargaining power between defendants and himself was unquestionably unequal, in that Mr. Jackson is a relatively unsophisticated consumer contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their sales contracts. Mr. Jackson also avers that, based upon his own experience and his understanding of the standard practices of the CWS sales representatives, consumers like Mr. Jackson and all others similarly situated are induced to sign the CWS Sales Contract that includes the arbitration clause as part of the high pressure and patently misleading sales pitch in the consumers' homes. There was no mention that the arbitration clause would cover Home Depot, and nothing in the plain language of the form CWS Purchase Agreement that indicates that the arbitration clause would apply to any

parties other than CWS ("Seller") and the consumers ("Buyer"). The subsequent Home Depot Home Improvement Agreement didn't reiterate the arbitration clause, didn't attach it, and didn't incorporate it either expressly or by reference.

The most damning procedural unconscionability was Home Depot's intentional choice to omit the page of the CWS Purchase Agreement that contained the arbitration clause from its Home Improvement Agreement, while at the same time taking another page of that same CWS Purchase Agreement (the cancellation page) and incorporating it right into the Home Depot contract. Home Depot even changed the color of the cancellation page of the CWS Purchase Agreement that it wanted to expressly incorporate to yellow, just to make sure that Mr. Jackson got the message that he couldn't now cancel the sales transaction. Home Depot's intentional conduct in effectively hiding the CWS arbitration clause demonstrates a high level of procedural unconscionability.

As for substantive unconscionability, the CWS arbitration clause does not mention that the consumers like Mr. Jackson are forfeiting their right to trial and a jury. See *King v. Bryant*, 235 N.C. App. 218 at *10, 763 S.E.2d 338, review allowed, 367 N.C. 794, 766 S.E.2d 633 (2014). To the contrary, the CWS agreement references North Carolina courts in multiple places, which could be extremely confusing to laypersons like Mr. Jackson. The CWS arbitration clause expressly states: "Buyer irrevocably consents to and confers personal jurisdiction upon the courts of the State of North Carolina, and waives any objections to the venue of such courts." This could not be more misleading to a lay consumer if it tried to be.

Also, using Mr. Jackson as an example, the putative class members' damages are so low ($1080 in the case of Mr. Jackson) that it is unlikely that any attorneys would be willing to accept the risks attendant to pursuing these claims. These twin factors demonstrate some measure of substantive unconscionability.

These facts lead to the conclusion that the arbitration clause is both procedurally and substantively unconscionable. North Carolina courts have ruled, both before and after *AT & T Mobility v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), and *American Express Co. v. Italian Colors Rest.*, 133 U.S. 2304, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013),

> an ultimate finding of unconscionability may be made when the contract presents a pronounced measure of procedural unfairness and only a minimal degree of substantive unfairness or *vice versa*. *Tillman*, 362 N.C. at 103, 655 S.E.2d at 370; *Torrence [v. Nationwide Budget Finance]*, 232 N.C.App. 306, 315, 753 S.E.2d 802, 807 (2014). Numerically speaking, a contract may be considered unconscionable when it suffers from even 99% procedural unconscionability and only 1% substantive unconscionability or *vice versa*. *See Tillman*, 362 N.C. at 103, 655 S.E.2d at 370; *Torrence*, 232 N.C.App. at 103, 753 S.E.2d at 807.

King, 235 N.C. App. 218 at *10. Taken together, the procedural and substantive unconscionability present here compels the Court to refuse to compel arbitration.

Third-Party Plaintiff Jackson also avers that he was fraudulently induced into arbitration, via fraud by

omission. In order to plead fraud by omission under North Carolina law, a plaintiff must allege the following:(1) the relationship or situation giving rise to the duty to speak, (2) the event or events triggering the duty to speak, and/or the general time period over which the relationship arose and the fraudulent conduct occurred, (3) the general content of the information that was withheld and the reason for its materiality, (4) the identity of those under a duty who failed to make such disclosures, (5) what those defendant(s) gained by withholding information, (6) why plaintiff's reliance on the omission was both reasonable and detrimental, and (7) the damages proximately flowing from such reliance. *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 484 (W.D.N.C. 2009), quoting *Breeden v. Richmond Community College*, 171 F.R.D. 189, 195 (M.D.N.C.1997) (citations omitted).

Here, the CWS sales representative who came to Mr. Jackson's house on July 24, 2014, and induced Mr. Jackson to sign the CWS sales contract including the arbitration clause, committed fraud by omission. The CWS sales representative, as part of a standard sales pitch given to all prospective purchasers, did not explicitly mention the arbitration provision, read any part of it to Mr. Jackson, or otherwise point it out to Mr. Jackson. Material terms not disclosed, including the waiver of the right to trial by jury, the misleading statements about the jurisdiction and venue of the North Carolina courts, the failure to state that no class action would be allowed, failure to state that Mr. Jackson would not be able to get a lawyer, and the failure to state that while a court proceeding would be paid for by the taxpayers, the costs of arbitration would be borne by Mr. Jackson. The CWS arbitration clause

didn't articulate all the parties that would be potentially covered, nor did it contain a delegation clause regarding who decides issues of arbitrability. This arbitration clause is so misleading, so lacking in specificity, and completely silent as to any material explanation of the extremely broad scope of arbitration that Mr. Jackson was "agreeing" to as to constitute fraud by omission. This provides an independent basis for denying the instant motion.

CONCLUSION

For all of the foregoing reason, the Court should deny Home Depot's motion.

Dated: December 14, 2016

* * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 3:16-cv-00712-GCM

CITIBANK, N.A.,
Plaintiff,

v.

GEORGE W. JACKSON,
Defendant.

GEORGE W. JACKSON,
Third-Party Plaintiff,

v.

HOME DEPOT U.S.A., INC. AND
CAROLINA WATER SYSTEMS, INC.,
Third-Party Defendants.

HOME DEPOT U.S.A., INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION TO DISMISS

* * *

INTRODUCTION

This case began in state court when Citibank, N.A. ("Citibank") attempted to collect payment for a water treatment system purchased by Mr. Jackson using a Home Depot Consumer Credit Card issued by Citibank. In response, Mr. Jackson asserted a counterclaim against Citibank and filed class action claims against Home Depot U.S.A., Inc. ("Home Depot") and Carolina Water Systems, Inc. ("CWS"). *See* Doc. No. 1-1. Citibank then voluntarily dismissed its claim against Mr. Jackson. Home Depot later timely removed the case to this Court under the Class Action Fairness Act of 2005 ("CAFA").

Because the agreement governing Mr. Jackson's Citibank account (the "Card Agreement") and the agreement governing Mr. Jackson's purchase of the water treatment system from CWS (the "Purchase Agreement") require arbitration of any disputes arising under or relating to the agreements, Citibank, Home Depot, and CWS moved to compel arbitration of the claims asserted in the Complaint and dismiss this lawsuit. Doc. Nos. 11-13, 16-18. Shortly thereafter, recognizing the breadth of the Citibank arbitration agreement, and attempting to avoid its effect, Mr. Jackson amended the Complaint to eliminate any claims against Citibank, while leaving his claims against Home Depot and CWS substantially unchanged (the "Amended Complaint"). Doc. No. 30. After Mr. Jackson dropped Citibank from this case, Home Depot and CWS renewed their motions to dismiss in favor of arbitration (together, the "Arbitration Motions"). Doc. Nos. 31-33.

Mr. Jackson makes three principal arguments in response to Home Depot's motion to dismiss in favor of arbitration: (1) the Court must decide Mr. Jackson's pending motion to remand (the "Remand Motion") (Doc. No. 23) before considering the Arbitration Motions; (2) Mr. Jackson has nullified his agreement to arbitrate disputes arising under the Card Agreement by withdrawing his claims against Citibank; and (3) Home Depot cannot rely on the arbitration provision of the CWS Purchase Agreement because, among other things, Home Depot was not a party to the agreement and the agreement is purportedly a "nullity" and unenforceable. All of these arguments fail.

First, the Supreme Court has established that courts have discretion to "choose among threshold

grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citations and quotations omitted). This Court should exercise its discretion to dismiss the case in favor of arbitration rather than reach the Remand Motion, the latter of which involves Mr. Jackson's request for jurisdictional discovery and potentially complex issues of statutory interpretation. Deciding the threshold arbitration issue will serve the interests of judicial economy because the merits of this case should be decided by an arbitrator, not by any court.

Second, Home Depot has the right to enforce the Citibank arbitration agreement as a third party beneficiary because the agreement expressly requires arbitration of claims "against anyone connected with" Citibank. Mr. Jackson's opposition brief relies on a counterfactual argument that assumes Citibank never had anything to with this case, but Mr. Jackson's withdrawal of his claims against Citibank did not change the fact that Mr. Jackson's claims against Home Depot relate to the Card Agreement governing the credit card he used to finance his purchase of the water treatment system.

Third, Mr. Jackson's challenges to the CWS Purchase Agreement are either irrelevant, must be decided by an arbitrator, or are unsupported by evidence. Mr. Jackson's argument that Home Depot is not a party to the Purchase Agreement is irrelevant because Home Depot has the right to enforce the CWS arbitration agreement as a third party given that Mr. Jackson alleges that Home Depot and CWS engaged in interdependent and concerted misconduct. Mr. Jackson's attempt to avoid his agreement with CWS by arguing

that it violates the North Carolina referral sales statute assumes that Mr. Jackson has already prevailed and is contrary to Supreme Court precedent that a challenge to the validity of a contract as a whole is for the arbitrator, not a court, to decide. Finally, Mr. Jackson's arguments that the arbitration provision in the Purchase agreement is unconscionable and was procured by fraud must be supported by evidence at this stage and he has produced none. In any event, they lack merit.

For these reasons, the Court should exercise its discretion to dismiss this case in favor of arbitration.

ARGUMENT

I. THIS COURT SHOULD DISMISS THIS ACTION IN FAVOR OF ARBITRATION BEFORE ADDRESSING REMAND.

This Court should address the threshold grounds for dismissal that Home Depot and CWS have raised in their Arbitration Motions before the Court addresses the Remand Motion, because the arbitration issue is logically antecedent to subject matter jurisdiction and because doing so will serve the interests of judicial economy.

The Supreme Court has held that courts should "bypass[ ] questions of subject-matter and personal jurisdiction" ***either*** (1) when a party has raised threshold non-merits questions that are "logically antecedent" to jurisdiction, *see Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999) (addressing class certification before jurisdiction because certification was "'logically antecedent' to Article III concerns") (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997)), ***or*** (2) when "considerations of convenience, fairness,

and judicial economy so warrant," *Sinochem*, 549 U.S. at 432.[1] Both grounds support deciding the Arbitration Motions before the Remand Motion here.

First, arbitrability is a "threshold matter[ ]," *Tribal Casino Gaming Enter. v. W.G. Yates & Sons Constr. Co.*, No. 1:16-CV-00030-MR-DLH, 2016 WL 3583813, at *3 (W.D.N.C. July 1, 2016), and contrary to Mr. Jackson's argument that the Arbitration Motions are "dispositive motions" involving the adjudication of "substantive issues," Doc. 35 at 5, "motions to stay litigation and compel related arbitration are non-dispositive motions" under the Federal Rules. *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 14 (1st Cir. 2010); *see also Herko v. Metropolitan Life Ins. Co.*, 978 F. Supp. 141, 142 n.1 (W.D.N.Y. 1997) ("The court has considered whether a motion to compel arbitration is a dispositive motion and has concluded it is not."). An arbitration motion "is not dispositive of either the case or any claim or defense within it." *PowerShare*, 597 F.3d at 14. Rather, granting an arbitration motion merely means that the case must be heard in a different forum. As such, an arbitration agreement "is, in effect, a specialized kind of forum-selection clause." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974). Thus, a dismissal in favor of arbitration is not a judgment on the merits. As in *Sinochem*, "it is a determination that the merits should be adjudicated elsewhere." 549 U.S. at 432.

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[1] These principles apply in removed cases. *See Ruhrgas v. Marathon Oil*, 526 U.S. 574, 578 (1999) ("We hold that in cases removed from state court to federal court, as in cases originating in federal court, there is no unyielding jurisdictional hierarchy.").

Second, deciding the Arbitration Motions before the Remand Motion will serve the interests of convenience and judicial economy. Following *Sinochem*'s instruction that a court has discretion to "choose among threshold grounds for denying audience to a case on the merits," *Sinochem*, 549 U.S. at 431 (citation and quotations omitted), numerous courts have compelled arbitration or entered some other form of dismissal "immediately" to promote convenience and judicial economy. *See Maersk, Inc. v. Neewra, Inc.*, 554 F. Supp. 2d 424, 457 (S.D.N.Y. 2008) (courts are "entitled to dismiss an action more conveniently litigated elsewhere 'immediately'" without going through difficult and costly discovery to determine jurisdiction); *Ramasamy v. Essar Global Ltd.*, 825 F. Supp. 2d 466, 467 n.1 (S.D.N.Y. 2011) ("[b]ecause the Court has determined the case should be dismissed in favor of arbitration, it does not reach defendant's motion to dismiss for lack of personal jurisdiction..."); *Magi XXI, Inc. v. Stato della Città del Vaticano*, 818 F. Supp. 2d 597, 621 (E.D.N.Y. 2011), *aff'd*, 714 F.3d 714 (2d Cir. 2013) (bypassing issues of jurisdiction in order to decide arguments regarding forum selection clauses in the parties' contracts, holding "[p]rinciples of judicial economy dictate that the Court should avoid, if possible, the delays associated with discovery"); *Burnham Enter., LLC v. DACC Co. Ltd.*, No. 2:12-CV-111-WKW, 2013 WL 68923, at *1 n.2 (M.D. Ala. Jan. 7, 2013) ("Because the motions to compel arbitration dispose of the matter at this juncture, this opinion will not address the arguments raised in the motions to dismiss, which include challenges to personal jurisdiction").

Here, Mr. Jackson has already served two sets of jurisdictional discovery in connection with the Remand

Motion, and resolution of that motion will require this Court to decide several legal and factual issues. *See* Exhibit C (Requests for Production and Interrogatories attached). By contrast, as discussed below, although Mr. Jackson has raised several purported challenges to the Citibank Card Agreement and the CWS Purchase Agreement, those challenges should be decided by the arbitrator under settled law.

Because the issues raised in the Arbitration Motions are both logically antecedent to and more efficient to consider before subject matter jurisdiction, this Court has discretion to dismiss this case based on the arbitrability of the dispute rather than address Mr. Jackson's Remand Motion. *See In re Residential Capital, LLC*, No. 12-12020, 2016 WL 6155925, at *1 (Bkrtcy. S.D.N.Y. Oct. 21, 2016) (granting arbitration motion and dismissing motions on personal and subject matter jurisdiction as moot). "[I]t is appropriate to address the [a]rbitration [m]otions as the threshold matter because resolution of those motions will moot" the Remand Motion. *Id.* at *5; *see also In re LimitNone, LLC*, 551 F.3d 572, 577-78 (7th Cir. 2008) (affirming transfer based on forum selection clause before deciding remand motion); *Spradlin v. Lear Siegler Mgmt. Servs. Co.*, 926 F.2d 865, 869 (9th Cir. 1991) (affirming dismissal of removed action where lower court granted motion to dismiss for improper venue based on forum selection clause and therefore denied remand motion); *Koresko v. RealNetworks, Inc.*, 291 F. Supp. 2d 1157, 1162-63 (E.D. Cal. 2003) (where competing motions to dismiss and remand were pending, dismissing case for improper venue based on forum selection clause and therefore denying remand).

Mr. Jackson cites several cases for the proposition that remand should be decided first, but *none* of these cases address *Sinochem*. Four of these cases predate *Sinochem*. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 34, (1983); *TC Arrowpoint, L.P. v. Choate Const. Co.*, No. 3:05CV267-H, 2005 WL 2148934, at *1 (W.D.N.C. Sept. 7, 2005); *Terrell Indep. Sch. Dist. v. Benesight, Inc.*, No. CIV.A. 301CV1834G, 2001 WL 1636418, at *5 (N.D. Tex. Dec. 18, 2001); *Acosta v. Norwegian Cruise Line, Ltd.*, 303 F. Supp. 2d 1327, 1331 (S.D. Fla. 2003). The post-*Sinochem* cases Mr. Jackson cites similarly do not discuss the court's discretion to choose among threshold grounds to deny audience to a case on the merits, and fail to consider *Sinochem* at all. *See Socoloff v. LRN Corp.*, No. CV 13-4910-CAS AGRx, 2013 WL 4479010, at *2 (C.D. Cal. Aug. 19, 2013); *Niami v. Fed. Exp. Print Servs., Inc.*, No. C 09-4384 JF, 2010 WL 958045, at *7 (N.D. Cal. Mar. 12, 2010); *Liberty Nw. Ins. Co. v. Certain Underwriters at Lloyd's*, No. 15-CV-02334-WHO, 2015 WL 5012758, at *1 (N.D. Cal. Aug. 24, 2015) (citing *Niami*); *Diego v. Golden Valley Health Centers*, No. 1:15-CV-00085-JAM, 2015 WL 4112276, at *3 (E.D. Cal. July 8, 2015).

Under *Sinochem*, this Court has the authority and the discretion to resolve the threshold issue of arbitrability now and send the case to arbitration before engaging in the more complex jurisdictional inquiry that Mr. Jackson's Remand Motion would require. Deciding the arbitration issue first also promotes judicial economy because remanding the case to state court merely postpones the arbitration decision by forcing another court to make it.

II. AMENDING THE COMPLAINT DID NOT TAKE THE CITIBANK ARBITRATION PROVISION OUT OF THIS CASE.

Mr. Jackson argues that he can avoid his obligation to arbitrate disputes under his Citibank Card Agreement because he dropped his claims against Citibank and excised any mention of Citibank from his Amended Complaint. Because the Amended Complaint, unlike the original Complaint, now contains "no reference to Citibank or the financing obtained through Citibank," Mr. Jackson argues that the Card Agreement has been removed from the case. Doc. 35 at 10. Such procedural gamesmanship,[2] however, does not nullify the existence of the Card Agreement or its arbitration provisions, and it does not change the fact that Mr. Jackson purchased his water treatment system using a credit card subject to the Card Agreement. *See Macko v. Disaster Masters, Inc.*, No. 1:10CV424,

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[2] Despite the arguments in Mr. Jackson's opposition (Doc. 27) to Home Depot's motion to realign the parties (Doc. 14) and his Remand Motion, Mr. Jackson's dismissal of Citibank confirms that the primary purpose of this litigation is the pursuit of his claims against Home Depot and CWS and that Home Depot and CWS are the defendants in this case. In fact, Mr. Jackson consistently refers to himself as "Plaintiff" throughout his opposition brief. By filing the Amended Complaint, Mr. Jackson is attempting to have his cake and eat it too. He has opportunistically brought a class action in state court under a supposed loophole to CAFA preventing Home Depot (as a non-original defendant) from exercising its right to remove. Mr. Jackson was only able to do that by bringing Home Depot into the case as a third party to Citibank's lawsuit. But now Mr. Jackson would like to pretend that Citibank has nothing to do with this case to avoid the effect of the arbitration provisions of the Card Agreement. He should not be permitted to do so.

2011 WL 1458504, at *3 (M.D.N.C. Apr. 15, 2011) (parties may amend pleadings, but "disavowed portions of an original pleading may remain relevant to the proceedings"). Even after amendment, statements made in the prior pleading "are not rendered inadmissible, and may be considered by this Court." *Cananwill, Inc. v. EMAR Grp., Inc.*, 250 B.R. 533, 545 (M.D.N.C. 1999) ("This determination is consistent with the view that '[a] party ... cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories.'") (alteration in original; italics excluded) (quoting *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984)).

Ignoring Citibank's role in this dispute, Mr. Jackson's argument relies on a counterfactual — that if he had paid cash for the water treatment system, or used a home equity loan, or borrowed money from a friend, Citibank would never have been involved. Doc. 35 at 11, 14. But that is not what happened. Mr. Jackson paid for his water treatment system using a credit card subject to the Card Agreement and defaulted on his obligations under the agreement. When Citibank sought to remedy Mr. Jackson's breach, Mr. Jackson brought Home Depot and CWS into the case to avoid having to pay Citibank. Thus, this controversy arose from and relates to a dispute between Mr. Jackson and Citibank under the Card Agreement. Amending his pleading to drop any mention of Citibank does not change any of those facts.

Moreover, contrary to the argument in Mr. Jackson's brief that "[n]owhere in the operative Complaint

is there any claim that Mr. Jackson seeks to 'void the Card Agreement,'" Doc. 35 at 12, as explained in Home Depot's motion, Mr. Jackson alleges in the Amended Complaint that "all contracts between Jackson and HOME DEPOT, CWS, or others having anything to do with the water treatment systems at issue" are "'void and a nullity.'" Am. Compl. ¶ 6. Indeed, Mr. Jackson acknowledges that he still has "an open Home Depot credit card account serviced by Citibank," and concedes that if he were to prevail in this case, it would have the "practical effect" of invalidating his debt to Citibank. Doc. 35 at 12-13. Mr. Jackson's related argument that "Home Depot's allegation of joint and several liability" with Citibank is "entirely pretextual" and "wholly disingenuous," Doc. 35 at 13, ignores the fact that the allegation of joint and several liability with Citibank is not Home Depot's invention. Rather, it was a direct quote from Mr. Jackson's prior complaint. *See* Doc. 33 at 12-13 (quoting Compl. ¶ 75, which alleged that "Citibank is subject to all claims and defenses that Jackson has against Home Depot and CWS" and that "Citibank is jointly and severally liable to Jackson"). Evaluating Home Depot's motion based on Mr. Jackson's allegations demonstrates that the remaining claims in this action still "relate to" the Card Agreement.

In the alternative, Mr. Jackson argues that the arbitration agreement only applies to disputes between the bank and the debtor. Doc. 35 at 14. The plain language of the arbitration agreement forecloses that argument: **"Whose Claims are subject to arbitration?** Not only ours and yours, but also Claims made by or against anyone connected with us or you or claiming through us or you...." Ryning Aff., Ex. 1 [Doc.

13-1]. Mr. Jackson concedes as much when he attempts to distinguish the CWS arbitration agreement from the "extremely broad Citibank arbitration clause, which expressly brings within its ambit 'anyone connected with [Citibank].'" Doc. 35 at 10. Mr. Jackson makes no effort to distinguish the numerous cases cited by Home Depot in its opening brief that third party beneficiaries can enforce arbitration agreements against a signatory. *See* Doc. 33 at 13-14; *Washington Square Sec., Inc. v. Aune*, 253 F. Supp. 2d 839, 844 (W.D.N.C. 2003), *aff'd*, 385 F.3d 432 (4th Cir. 2004) (holding that third party beneficiaries could enforce arbitration provision). Nor can Mr. Jackson deny the connection between Home Depot and Citibank, given that his purchase of the water treatment system was made using a Home Depot credit card serviced by Citibank.

Finally, Mr. Jackson has no response to Home Depot's argument that the arbitrability of this dispute is itself subject to determination by an arbitrator. Under the plain terms of the arbitration agreement, "Claims regarding the application, enforceability, or interpretation of this Agreement and this arbitration provision" are subject to arbitration. Ryning Aff., Ex. 1 [Doc. 13-1]. Thus, to the extent there is any doubt whether the arbitration provisions of the Card Agreement apply here (and there is none), such doubt must be resolved by an arbitrator. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010) ("parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy).

III. HOME DEPOT MAY ENFORCE THE CWS ARBITRATION AGREEMENT AS A NON-SIGNATORY.

A. The Home Improvement Agreement Is Not At Issue On This Motion.

Mr. Jackson argues that because the Home Improvement Agreement ("HIA") between Home Depot and Mr. Jackson does not independently contain a separate arbitration clause, it somehow relieves him of his obligation to arbitrate under the CWS Purchase Agreement. Doc. 35 at 8.[3] That argument is a red herring. Home Depot has never claimed that this case is arbitrable under the HIA.

As an initial matter, Mr. Jackson makes several unsubstantiated arguments about Home Depot having gone "out of its way to *not* include the CWS arbitration provision" in the HIA and "intentionally" not adding the page containing the arbitration clause. Doc. 35 at 9. But Mr. Jackson offers no evidence that Home Depot presented him with the document attached to the Amended Complaint, much less what Home Depot's intent was regarding the document, as he is required to do to support his challenge to the arbitration provision of the CWS Purchase Agreement. Such challenges to the validity of an arbitration agreement are evaluated under a summary judgment standard, such that "the opponent may not rest upon the mere allegations or denials of her pleading but must instead, *by*

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[3] To the extent Mr. Jackson argues that the language of the HIA also precludes Home Depot from relying on the arbitration provisions of the Citibank Card Agreement, that argument is foreclosed by the plain language and broad scope of the Card Agreement, as discussed above.

affidavit or other evidentiary showing, set out specific facts showing a genuine dispute for trial." *Roach v. Navient Solutions, Inc.*, 165 F. Supp. 3d 343, 348 (D. Md. 2015) (emphasis in original). Mr. Jackson's "unsworn *ipse dixit* in [his] opposition memorandum" is nowhere near sufficient to meet his burden. *Id.* at 350.[4]

In any event, these arguments have no bearing on the Arbitration Motions. The HIA is not at issue on this motion, and the purported omission of the CWS arbitration clause does not establish that Home Depot intended that any dispute between it and Mr. Jackson could never be arbitrated, particularly where other parties are involved. Mr. Jackson's attempt to turn "silence" (Doc. 35 at 10) into an affirmative statement that Home Depot opted out of arbitration in all cases is illogical.

Mr. Jackson also argues that the HIA is the only agreement between him and Home Depot, and that it supersedes all prior agreements with CWS. Doc. 35 at 9. That may be true insofar as it concerns the relationship between Home Depot and Mr. Jackson, but that is a separate matter from the relationship between Mr. Jackson and CWS. Put differently, even assuming that the HIA is the only agreement between

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[4] Mr. Jackson cannot even satisfy the pleading standard applicable under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)), or the particularity requirement of Rule 9(b) because the Amended Complaint contains no allegation that Home Depot selectively included only part of the CWS Purchase Agreement in the HIA. "It is well-established that parties cannot amend their complaints through briefing or oral advocacy." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013).

Home Depot and Mr. Jackson, and that it supersedes any other agreements between those two parties, that says nothing about other agreements Mr. Jackson has with CWS. Home Depot is not a party to the CWS contract, but Home Depot does not need to be a signatory to that agreement to enforce it.

B. Home Depot May Enforce The Arbitration Provision Of The CWS Purchase Agreement Against Mr. Jackson.

The Fourth Circuit has held that the determination of whether a nonsignatory is bound by or may enforce a contract is controlled by the federal substantive law of arbitrability. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 & n.4 (4th Cir. 2000).[5] Under federal law, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." *Int'l Paper*, 206 F.3d at 416-17 & n.5 (collecting cases as well as "a burgeoning array of secondary authorities"); *see also James C. Greene Co. v. Great American E & S Ins. Co.*, 321 F. Supp. 2d 717, 719 (E.D.N.C. 2004) ("A number of courts, including the Fourth Circuit, have recognized an 'intertwined claims' exception to the general rule"

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[5] The Supreme Court has added that "'traditional principles' of state law" are relevant to the extent there is applicable "state law *permitting* arbitration by or against nonparties to the written arbitration agreement." *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31 & n.5 (2009) (emphasis in original). In any event, "North Carolina's law of equitable estoppel is the same as Fourth Circuit law." *Klopfer v. Queens Gap Mountain, LLC*, 816 F. Supp. 2d 281, 292 n.5 (W.D.N.C. 2011).

that an arbitration provision only applies to the parties) (citing *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988)); *Sanchez v. Clean-Net USA, Inc.*, 78 F. Supp. 3d 747, 758 (N.D. Ill. 2015) ("courts regularly allow non-signatory entities to enforce an arbitration agreement against a signatory on the basis of equitable estoppel"); *Elkjer v. Scheef & Stone, L.L.P.*, 8 F. Supp. 3d 845, 857 (N.D. Tex. 2014) ("Under certain circumstances, a non-signatory to a contract with an arbitration clause may compel arbitration based on a theory of equitable estoppel as a fairness principle.").

Where a non-signatory seeks to compel arbitration of claims by a plaintiff who is a signatory to such an agreement, it may do so "on the basis of equitable estoppel, so long as two requirements are met: (1) the subject matter of the dispute must be 'intertwined with the contract providing for arbitration'; and (2) there must be a 'relationship among the parties of a nature that justifies a conclusion that the party which agreed to arbitrate with another entity should be estopped from denying an obligation to arbitrate a similar dispute with the adversary which is not a party to the arbitration agreement.'" *In re Apple iPhone 3G Prods. Liability Litig.*, 859 F. Supp. 2d 1084, 1096 (N.D. Cal. 2012); *see also James C. Greene Co.*, 321 F. Supp. 2d at 720 (holding that non-party to arbitration agreement could enforce arbitration because plaintiff "alleges that defendants collectively engaged in a course of conduct that violated" North Carolina law); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (holding that non-signatory could enforce arbitration agreement when signatory and non-signatory allegedly engaged in

"interdependent and concerted misconduct"). Both of these requirements are met here.

Mr. Jackson argues that his agreement to purchase a water treatment system is void and a nullity and alleges two counts against both Home Depot and CWS. Am. Compl. ¶¶ 48-56 (Count I against both Home Depot and CWS); ¶¶ 57-64 (Count II against both Home Depot and CWS). Thus, the first prong of the equitable estoppel test is met because the subject matter of the dispute, whether Home Depot and CWS violated North Carolina law in connection with the sale of the water treatment system, is intertwined with the Purchase Agreement concerning that sale and containing the arbitration clause, which Mr. Jackson seeks to void. Further, Mr. Jackson's factual allegations make no attempt to distinguish between Home Depot and CWS. *See* Am. Compl. ¶¶ 14-24 ("Home Depot and CWS routinely..."; "Home Depot and CWS would represent..."; "Home Depot and CWS set up appointments..."; "Home Depot and CWS would show up..."; "Home Depot and CWS conducted a few water tests..."; "Home Depot and CWS used..."; "Home Depot and CWS enrolled customers..."). Thus, the second prong of the equitable estoppel test is met because Mr. Jackson alleges that Home Depot and CWS acted together in the alleged violation of law, and he pursues identical counts against both entities. *See Paragon Micro, Inc. v. Bundy*, 22 F. Supp. 3d 880, 890 (N.D. Ill. 2014) (holding that non-signatory could compel arbitration where plaintiff alleged "substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract"); *Elkjer*, 8 F. Supp. 3d at 857 (same).

C. Mr. Jackson's Argument That The Entire Sales Contract Is A Nullity Must Be Heard By An Arbitrator.

Assuming that Home Depot can enforce the CWS arbitration agreement as a non-signatory, Mr. Jackson next argues that the Court should simply ignore the existence of the CWS Purchase Agreement because both it and the HIA "are void and a nullity under North Carolina law." Doc. 35 at 15. This argument puts the cart before the horse, as it assumes that Mr. Jackson has already obtained a ruling that the Referral Sales Statute voids and nullifies the Purchase Agreement.

Not only does this argument assume Mr. Jackson has already prevailed in this litigation, it is one which the Supreme Court expressly rejected in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). In *Buckeye*, the Supreme Court held that when the challenge is to the contract itself, and "not specifically its arbitration provisions," that challenge "should therefore be considered by an arbitrator, not a court." *Id.* at 446. Moreover, the Supreme Court explicitly rejected the argument that its holding should not apply to "an agreement void *ab initio* under state law." *Id.* at 447. Thus, Mr. Jackson's argument that the entire agreement between him, Home Depot, and CWS is a nullity under North Carolina state law must be heard by an arbitrator in the first instance.

Mr. Jackson attempts to distinguish *Buckeye* on the basis that it does not address a situation in which the issue is "whether any agreement between the alleged obligor and obligee was ever concluded." *Buckeye*, 546 U.S. at 444 n.1; see Doc. 35 at 19 (citing *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d

396 (2d Cir. 2009)). Mr. Jackson misreads *Buckeye* and *Telenor*. *Buckeye* explains that the "ever concluded" situation concerns an issue over the formation of the contract, giving as examples whether the obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked mental capacity to assent. *Buckeye*, 546 U.S. at 444 n.1. Likewise, *Telenor* dealt with the issue of whether the alleged agent had authority to commit the alleged principal. *Telenor*, 584 F.3d at 411. In other words, those are *extrinsic* factors that have nothing to do with any provision of the contract itself. Mr. Jackson's argument regarding the allegedly illegal referral sales component, by contrast, is that "the illegality of one of the contract's provisions renders the whole contract invalid." *Buckeye*, 546 U.S. at 444. As the Supreme Court held, this is precisely the type of argument that must be decided by the arbitrator, not the court.

D. Mr. Jackson Has Not Met His Burden To Prove The CWS Arbitration Clause Was Unconscionable And Procured By Fraud.

Mr. Jackson next argues that the arbitration clause in the Purchase Agreement is void because it was procured by fraud by omission, and because of its purported unconscionability. Both arguments fail.

"A court will find a contract to be unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the

other." *Klopfer*, 816 F. Supp. 2d at 289 (quoting *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008)). As Mr. Jackson acknowledges, he "must prove both procedural and substantive unconscionability." Doc. 35 at 22 (quoting *Tillman*, 655 S.E.2d at 370). Mr. Jackson "bears the burden of proof for this affirmative defense." *Carson v. LendingTree LLC*, 456 F. App'x 234, 236 (4th Cir. 2011). His conclusory arguments do not meet this burden.

As explained above, disputes about the validity of an arbitration agreement are evaluated under a summary judgment standard, and Mr. Jackson was required "by affidavit or other evidentiary showing [to] set out specific facts" in support of his claim that the arbitration provision in the CWS Purchase Agreement is unconscionable. *Roach*, 165 F. Supp. 3d at 348. The arguments in Mr. Jackson's opposition brief are wholly insufficient to meet this burden, and his claim of unconscionability fails on this ground alone. *See id.* at 350.[6]

Setting aside Mr. Jackson's failure to support his arguments with evidence, those arguments still lack merit. In support of his procedural unconscionability argument, Mr. Jackson contends that the bargaining power between the parties was unequal, that he was pressured into signing the contract, and that his agreement with Home Depot did not include an arbitration clause. Doc. 35 at 23. First, North Carolina courts have held that "bargaining inequality alone

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[6] Here, too, Mr. Jackson cannot even satisfy the pleading standard under Rule 8 because the Amended Complaint is devoid of any allegations concerning the purported unconscionability of the arbitration provision in the CWS Purchase Agreement.

generally cannot establish procedural unconscionability." *Westmoreland v. High Point Healthcare Inc.*, 721 S.E.2d 712, 717 (N.C. App. 2012). Mr. Jackson does not claim that CWS or Home Depot would have refused to sell the water treatment system without an arbitration clause, or that he attempted to bargain over the clause and was refused. Second, Mr. Jackson does not claim that he was not given an opportunity to read the contract, or that he had to purchase the water treatment system immediately. *See Carson*, 456 F. App'x at 236 (no unconscionability where plaintiff did not allege she was "denied any opportunity for a meaningful choice"); *Klopfer*, 816 F. Supp. 2d at 290 (no unconscionability where plaintiff "did not provide evidence as to whether he asked such questions"). Third, Mr. Jackson's argument that there was no express language that the arbitration clause could cover Home Depot is beside the point, given that he chose to bring both Home Depot and CWS into the case together under identical theories of liability. Indeed, it would be nonsensical, and contrary to the strong federal and North Carolina policy favoring arbitration, if a signatory to an arbitration agreement could avoid arbitration by simply including a non-signatory in the lawsuit.

Mr. Jackson's two arguments for substantive unconscionability also fail. He argues that the arbitration clause does not mention the forfeiture of trial by jury, and that the damages are so small it is unlikely attorneys would pursue such claims. Doc. 35 at 24. Mr. Jackson cites only one case for the proposition that an arbitration clause that does not mention the right to trial by jury is substantively unconscionable. In *King v. Bryant*, 763 S.E.2d 338 (Table) (N.C. App. 2014), the

court held that, in a contract between a physician and a patient, the lack of any reference to a right to jury or judge, "when coupled with Defendants' *fiduciary duty*, constitutes *some* evidence of substantive unconscionability." *Id.* at *10 (emphasis added). Here, there is no fiduciary relationship between CWS or Home Depot and Mr. Jackson. Indeed, the *King* court rooted its conclusion "in the limited factual circumstances presented" there. *Id.* at *11. As for Mr. Jackson's argument about the individualized damages available in arbitration, North Carolina courts have held that a class action waiver does not render an arbitration clause unconscionable, and that decisions of the U.S. Supreme Court have articulated the "broader theme that unconscionability attacks that are directed at the arbitration process itself will no longer be tolerated." *See, e.g.*, *Torrence v. Nationwide Budget Fin.*, 753 S.E.2d 802, 811 (N.C. App. 2014); *Knox v. First Southern Cash Advance*, 753 S.E.2d 819, 822 (N.C. App. 2014) (no unconscionability despite class action waiver).[7]

Mr. Jackson's final arguments regarding fraudulent inducement and fraud by omission fare no better. Mr. Jackson recites the seven factors he must prove to establish fraud by omission under North Carolina law, but does not attempt to actually establish any of them with evidence. *See* Doc. 35 at 25 (citing *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 484 (W.D.N.C. 2009)). Instead, he merely argues that there was "a standard sales pitch" that did not include an explicit

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[7] Even if North Carolina courts did not recognize the policy favoring arbitration, "the Federal Arbitration Act favors strict enforcement of arbitration provisions and preempts state laws that interfere with arbitration." *Keena v. Groupon, Inc.*, 2016 WL 3450828, at *7 (W.D.N.C. Jun. 21, 2016) (Mullen, J.)

mention of the arbitration provision, and that the CWS sales representative failed to read the arbitration provision to Mr. Jackson. Doc. 35 at 25. Once again, these arguments do not satisfy Mr. Jackson's evidentiary burden. *See Roach*, 165 F. Supp. 3d at 348.[8] Moreover, Mr. Jackson does not even allege the existence of a duty to speak, given that the arbitration clause was included in the short three-page agreement he signed. *See Biesecker v. Biesecker*, 302 S.E.2d 826, 828-29 (N.C. App. 1983) (A "person signing a written instrument is under a duty to read it for his own protection, and ordinarily is charged with knowledge of its contents. Nor may he predicate an action for fraud on his ignorance of the legal effect of its terms.") (citation and quotations omitted). Nor does Mr. Jackson attempt to show how his purported reliance on the lack of an auditory reading of the arbitration clause induced him to sign the agreement. Mr. Jackson's conclusory arguments regarding fraud by omission, just like his unconscionability arguments, do not provide a basis for avoiding arbitration.

CONCLUSION

This Court should exercise its discretion to grant the Arbitration Motions and deny the Remand Motion as moot.

Respectfully submitted this 11th day of January, 2017.

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[8] Like his other arguments concerning the arbitration provision in the CWS Purchase Agreement, these arguments are not based on any allegations in the Amended Complaint, and thus do not pass muster under the pleading standards applicable under Rule 8 and Rule 9(b).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-184
(3:16-cv-00712-GCM)

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

January 22, 2018

ORDER

In accordance with the published opinion issued today in Case No. 17-1627, Jackson v. Home Depot U.S.A., Inc., the court grants the petition for permission to appeal.

For the Court

/s/ Patricia S. Connor, Clerk

No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

This action was commenced when Citibank, N.A. filed a routine state-court collection action against respondent George W. Jackson. Petitioner Home Depot U.S.A., Inc. was not an original party to that action and never became a party to that collection dispute. Jackson then filed a counterclaim against Citibank asserting class-action consumer-protection claims. In addition to naming Citibank, Jackson named Home Depot and another company as original defendants to that counterclaim class action. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, permits "any defendant" in a state-court class action to remove the action to federal court if it satisfies certain jurisdictional requirements. Petitioner Home Depot is an original defendant in the class action at issue here and was never a plaintiff in any claim associated with this case. The questions presented are:

1. Whether this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—should extend to third-party counterclaim defendants.

2. Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act when the class action was originally asserted as a counterclaim against a co-defendant.

PARTIES TO THE PROCEEDINGS

Petitioner Home Depot, U.S.A., Inc. was an original defendant to the class action brought as a counterclaim in the state court and in the district court and was the appellant in the court of appeals.

Respondent George W. Jackson was the original defendant and the counterclaim plaintiff in state court and in the district court and was the appellee in the court of appeals.

Citibank, N.A. was the original plaintiff in state court and the counterclaim defendant in the state court and in the district court; it did not participate in the proceedings in the court of appeals; it is no longer a party to this case.

Carolina Water Systems, Inc. was an original defendant to the class action brought as a counterclaim in the state court and in the district court; it did not participate in the proceedings in the court of appeals.

RULE 29.6 STATEMENT

Petitioner Home Depot U.S.A., Inc. is wholly owned by The Home Depot, Inc., a publicly traded company on the New York Stock Exchange. The Home Depot, Inc. has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 880 F.3d 165. The opinion of the district court (Pet. App. 16a-23a) is not published in the *Federal Supplement* but is available at 2017 WL 1091367.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2018. Pet. App. 1a. The petition for a writ of certiorari was filed on April 23, 2018, and was granted on September 27, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in an appendix to this brief.

INTRODUCTION

Removal is about fairness: fairness to out-of-state litigants and fairness to state-court defendants in cases over which state and federal courts exercise concurrent jurisdiction. When the Framers created diversity jurisdiction in federal courts, they sought to protect out-of-state litigants from state-court biases. A plaintiff can invoke that protection by filing a qualifying case in federal court at the outset; but a defendant has no say in the plaintiff's initial choice of forum. To even the playing field, the first Congress granted to out-of-state defendants the right to remove a case that would qualify for original diversity jurisdiction. With removal in play, the plaintiff and defendant each have one opportunity to invoke the jurisdiction of a federal court.

When this Court held in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that a plaintiff that files suit in state court cannot remove a case in response to a counterclaim, it maintained the balance established by the first Congress: the original plaintiff had one opportunity to invoke the jurisdiction of the federal court and, having waived that right when it instead filed in state court, it was not afforded a second opportunity to invoke federal jurisdiction in response to a counterclaim. But *Shamrock Oil*'s original-plaintiff rule has no application to a party that is brought into state court involuntarily as a defendant to a counterclaim. Such a party would have *zero* opportunities to invoke federal jurisdiction if not permitted to remove. Such a party should therefore be entitled to remove a qualifying counterclaim.

Congress codified that fairness principle in plain language, giving the right of removal to "the defendant or the defendants" in the general removal statute, 28 U.S.C. § 1441(a), and to "any defendant" in the class-action removal provision, 28 U.S.C. § 1453(b). The questions in this case present the same fundamental issue: whether a party that is brought involuntarily into state-court proceedings as a defendant is a defendant. The answer is yes. A defendant that did not voluntarily subject itself to state-court jurisdiction has the right to remove a qualifying claim—and that is true whether the defendant was named in the original plaintiff's complaint or, as here, was brought into a case as a defendant to claims asserted as counterclaims.

The courts of appeals have undermined that balanced system by prohibiting third-party counterclaim defendants from removing—without any basis in the

text, structure, purposes, or history of the relevant statutory provisions. Courts of appeals' "original-defendant" rule is not supported by the text of any removal provision or by any of this Court's decisions construing those provisions. And it is particularly perverse as applied to removal under the Class Action Fairness Act of 2005, which was enacted for the express purpose of expanding the category of defendants entitled to remove qualifying class actions. This Court should reverse the decision below and abrogate the other circuit decisions that have misconstrued 28 U.S.C. § 1441(a) and § 1453(b).

STATEMENT

1. a. The general removal statute, 28 U.S.C. § 1441, establishes the default rules governing removal of actions from state to federal court. It provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the [appropriate] district court of the United States" when certain requirements not in issue here are satisfied. *Id.* § 1441(a). It further provides that, when diversity jurisdiction provides the basis for removal, an action "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." *Id.* § 1441(b)(2). When an action involves both state- and federal-law claims, Section 1441 provides that the entire matter may be removed and further provides that any claim over which the federal district court cannot exercise jurisdiction—either because the claim is "not within the original or supplemental jurisdiction of the district court" or because it

"has been made nonremovable by statute"—may be severed and remanded to state court. *Id.* § 1441(c).

The procedures governing removal are set out in 28 U.S.C. § 1446. That section establishes timing requirements for a defendant's exercise of its right to remove. *Id.* § 1446(b)(1), (b)(2)(C), (b)(3), and (c)(1). It further states that, when Section 1441(a) provides the sole basis for removal, "all defendants who have been properly joined and served must join in or consent to the removal of the action." *Id.* § 1446(b)(2)(A).

b. In 2005, Congress enacted the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, to address what it perceived as "abuses" of the class-action system. S. Rep. No. 109-14, at 4 (2005) (Senate Report). In particular, the Senate Report explained that Congress was concerned that "most class actions" were being "adjudicated in state courts, where the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and where there is often inadequate supervision over litigation procedures and proposed settlements." *Ibid.* The Senate Report observed that existing "law enable[d] lawyers to 'game' the procedural rules and keep nationwide or multistate class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests"—and that, as a result, "consumers are the big losers." *Ibid.* To address those problems, Congress amended the provisions governing federal diversity jurisdiction over class actions. As relevant here, Congress "modifie[d] the federal removal statutes to ensure that qualifying interstate class actions initially brought in state courts may be heard by federal courts

if any of the defendants so desire." *Id.* at 5; *see id.* at 6 ("This Committee believes that the current diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses . . . .").

By enacting CAFA, Congress sought to change existing laws that "enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." Senate Report 10. "In order to enable more class actions to be removed to federal court," Congress "amend[ed] the diversity jurisdiction and removal statutes applicable to" large class actions by "incorporat[ing] the concept of balanced diversity." *Id.* at 28, 29. Specifically, CAFA amended 28 U.S.C. § 1332, which governs diversity jurisdiction, to give federal courts original jurisdiction over, *inter alia*, most class actions in which the amount in controversy exceeds $5 million and "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A).

CAFA also enacted 28 U.S.C. § 1453, which establishes rules and procedures for the removal of class actions. Although Section 1453 incorporates many of the general removal procedures set forth in Sections 1441 and 1446, it intentionally deviates from some of the limits in those provisions in order to expand the range of state-court class actions that are removable. Three changes are particularly relevant here. First, whereas Section 1441(a) authorizes removal by "the defendant or the defendants," Section 1453(b) authorizes removal by "any defendant." Second, Section 1453(b) dispenses with the rule that all defendants must consent to removal. Third, Section 1453(b) authorizes removal even when one or more defendants is a citizen

of the State in which the suit was filed. 28 U.S.C. § 1453(b). In construing CAFA's application to removal proceedings, this Court has noted that "no anti-removal presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014).

c. The questions presented in this case involve the application of removal rules set out in Sections 1441 and 1453 to parties that, although not originally involved in a civil action filed in state court, become involved as third-party defendants to a counterclaim. Neither statute expressly addresses its application to third-party defendants.

In *Shamrock Oil & Gas Corp. v. Sheets*, this Court confronted the question whether an original state-court plaintiff who faced a counterclaim from the original defendant could remove the action to federal court under the predecessor to Section 1441(a). 313 U.S. 100, 103 (1941). The removal provision at issue in that case authorized removal of a state-court action "of which the district courts of the United States are given original jurisdiction" when removal was sought "by the defendant or defendants therein." *Id.* at 104 n.1 (quoting 28 U.S.C. § 71 (1940)). The Court held that that provision did not authorize removal of a counterclaim by a party who was the original plaintiff (and became the counterclaim defendant) in the state-court action. *Id.* at 104-109. The Court explained that removal provisions in place between 1867 and 1887 had authorized removal by "either party"—but that nearly every other removal statute enacted since 1789 had limited "the privilege of removal to 'defendants' alone." *Id.* at 105; *id.* at 104-106. The Court viewed the "alterations in

the statute" to be of "controlling significance as indicating the Congressional purpose to narrow the federal jurisdiction on removal," *id.* at 107, and "to restrict the jurisdiction of the federal courts on removal," *id.* at 108. Concluding that the removal provision must be subject to a "strict construction," the Court found "no basis for saying that Congress, by omitting from the [operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Ibid.*

The Court had no occasion in *Shamrock Oil* to address the removal rights of a third-party counterclaim defendant (*i.e.*, a party who joined the case as a defendant to a counterclaim but was not an original plaintiff or defendant). But courts of appeals have consistently construed potentially overly broad language in *Shamrock Oil* to deny the right of removal under Section 1441(a) to such defendants. *See, e.g.*, *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants . . . ."). Building on those cases, courts of appeals have unanimously held that a third-party class-action counterclaim defendant is not entitled to remove under Section 1453(b), even though that provision does not use the same language as Section 1441(a) and was enacted as part of a concerted effort to expand the removal rights of class-action defendants. *See* Pet. App. 9a; *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Westwood Apex v. Contreras*, 644 F.3d

799, 804-805 (9th Cir. 2011); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.).

2. a. This case arises out of a debt-collection action filed in June 2016 in North Carolina state court by Citibank, N.A. against respondent George W. Jackson. Pet. App. 2a. Citibank alleged that Jackson had failed to pay for a water-treatment system he purchased using a Citibank-issued credit card. *Id.* at 2a-3a.

In his August 2016 answer to the complaint, Jackson asserted what he styled as a class-action "counterclaim" against Citibank and "class action third-party claims" against petitioner Home Depot U.S.A., Inc. and Carolina Water Systems, Inc. (CWS), neither of which was a party to the original collection dispute. Pet. App. 2a; JA18. Jackson alleged that Home Depot and CWS had engaged in unfair and deceptive trade practices by misleading consumers about the water-treatment systems sold by CWS as part of an agreement with Home Depot and that Citibank was jointly and severally liable because Home Depot "'directly sold or assigned the transaction to' Citibank." Pet. App. 3a (citation omitted). In September 2016, Citibank voluntarily dismissed its collection claims against Jackson without prejudice. *Ibid.*

In October 2016, Home Depot filed a notice of removal, relying on CAFA. Pet. App. 3a. Because the only controversy remaining in the case was the class action filed by Jackson, Home Depot then filed a motion to realign the parties to denominate Jackson as plaintiff and Home Depot, CWS, and Citibank as defendants. *Ibid.* On November 8, 2016, Jackson filed a motion to remand. *Ibid.* On November 18, Jackson amended his class-action complaint to remove any

reference to Citibank. *Ibid.* At that point, the only remaining controversy was Jackson's class-action claims against Home Depot and CWS, neither of which was a plaintiff in (or even a party to) the original debt-collection action filed in state court by Citibank.

In March 2017, the U.S. District Court for the Western District of North Carolina denied Home Depot's motion to realign the parties, explaining that "[t]his is not a situation where there are antagonistic parties on the same side" and noting that Citibank had "dismissed its claim against Jackson *without prejudice*." Pet. App. 22a. The court also granted Jackson's motion to remand, reasoning that, because Home Depot was not an original defendant in the collection action that started the case, it was not entitled to remove what remained of the case (*i.e.*, the class action). *Id.* at 19a-21a.

b. Home Depot appealed, and the U.S. Court of Appeals for the Fourth Circuit affirmed. Pet. App. 1a-15a.

The court of appeals first affirmed the district court's remand order. Pet. App. 4a-14a. The court of appeals explained that 28 U.S.C. § 1441(a) limits the right of removal to "the defendant or the defendants." Pet. App. 4a. Relying on *Shamrock Oil*, which construed similar language, the court held that Section 1441(a) does not authorize removal by a defendant to a claim asserted as a counterclaim—even when that defendant was not an original plaintiff in the suit. *Id.* at 4a-9a.

The court of appeals rejected Home Depot's argument that CAFA, which allows removal by "any defendant," 28 U.S.C. § 1453(b), expands the class of

defendants who can remove a case to include a third-party defendant to a class action asserted as a counterclaim when the defendant was not an original plaintiff (or any kind of plaintiff) in the case. Pet. App. 8a-14a. The court relied on circuit precedent—and decisions from two other circuits—holding that CAFA does not permit removal by a defendant to a counterclaim even when the defendant was not an original plaintiff. *Id.* at 7a (citing *Tri-State Water Treatment*, 845 F.3d at 355-356; *Westwood Apex*, 644 F.3d 799; *Palisades*, 552 F.3d at 334-336). The court further rejected Home Depot's argument that this Court's decision in *Dart Cherokee*, *supra*—which clarified that CAFA eliminates any antiremoval presumption for covered class actions—undermines the viability of those circuit court decisions. Pet. App. 9a-11a.

The court of appeals also rejected Home Depot's argument that the holdings of *Shamrock Oil* and of the circuit cases applying CAFA to counterclaim defendants do not apply to Home Depot because it is not a counter-defendant or a third-party defendant, but is simply a defendant in the only dispute remaining in this case. Pet. App. 11a-14a. In so holding, the court relied on the fact that, at the time Home Depot filed its notice of removal, Jackson had not yet dismissed his claims against Citibank (the original plaintiff). *Id.* at 12a. The court reasoned that accepting Home Depot's argument would permit gamesmanship because it would permit an original plaintiff to remove an otherwise unremovable counterclaim class action by dismissing its original claims. *Id.* at 13a-14a.

Finally, the court of appeals affirmed the district court's refusal to realign the parties. Pet. App. 14a-15a. Although the court of appeals acknowledged that

it "employs the 'principal purpose' test, in which [the court] determine[s] the primary issue in controversy and then align[s] the parties according to their positions with respect to that issue," *id.* at 14a, it refused to make such an alignment in this case because no party was attempting to evade limits on diversity jurisdiction, *id.* at 15a.

c. Home Depot filed a petition for a writ of certiorari, asking the Court to consider what is now the second question presented. On September 27, 2018, this Court granted the petition and asked the parties to also address what is now the first question presented.

SUMMARY OF ARGUMENT

I. The statutory provision governing general removal jurisdiction gives the right to remove to "the defendant or the defendants." 28 U.S.C. § 1441(a). Home Depot is undoubtedly a defendant in this litigation: it was brought into the case through service of process to face claims for relief against it. Home Depot should therefore be entitled to remove if all the other requirements of removal were satisfied. But courts of appeals have universally held the opposite—that a third-party counterclaim defendant has no right to remove because it does not qualify as one of "the defendants." That is incorrect.

Courts have premised that holding on a misreading of this Court's decision in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). That decision carved out an exception to the statutory rule that a defendant can remove a qualifying action, holding that an original plaintiff cannot remove based on a counterclaim asserted by the original defendant. The Court explained that an original plaintiff should be

made to abide its voluntarily invocation of the state court's jurisdiction, that the evolution of the general removal provision confirms its focus on the rights of defendants, and that the statutory text provides no basis for distinguishing between plaintiffs who can remove and plaintiffs who cannot remove. But the Court had no occasion to consider whether a counterclaim defendant that is *not* also a plaintiff can remove. That is the issue this Court asked the parties to address.

The same considerations that supported the Court's holding in *Shamrock Oil* dictate that a third-party counterclaim defendant qualifies as one of "the defendants"—and therefore has the right to remove a qualifying action—under Section 1441(a). The text of the statute does not support the original-defendant rule adopted by the courts of appeals. Nothing in Section 1441(a) or the other provisions governing general removal provides a basis for distinguishing among parties that are solely defendants. To the contrary, the rule necessarily speaks from the perspective of the claim at issue; if a party is an out-of-state defendant to a claim that otherwise qualifies for removal, that party has the right to remove.

The only exception to that common-sense rule is when the defendant is also the original plaintiff. But, as this Court explained in *Shamrock Oil*, that exception is grounded in the history and purposes of removal jurisdiction. The Founders created diversity jurisdiction in order to protect out-of-state parties from any local biases in state courts. But the first Congress recognized that the right of parties to invoke diversity jurisdiction required different forms of protection for plaintiffs and defendants. A plaintiff can invoke diversity jurisdiction by filing a qualifying case in federal

court at the outset. But an out-of-state defendant requires a right of removal in order to invoke the same protection. From the beginning, Congress has thus viewed removal jurisdiction as a defendant-friendly counterbalance to a plaintiff's right to choose the initial forum. And because the first Congress also respected state courts' concurrent jurisdiction over diversity matters, it limited the right of removal to defendants, requiring that a plaintiff that voluntarily submits itself to state-court jurisdiction must abide by its choice.

The original-plaintiff rule of *Shamrock Oil* perfectly reflects those considerations. But this Court should not extend the original-plaintiff exception to prohibit removal by a third-party counterclaim defendant. The text, structure, and history of the general removal provision instead dictate that a party involuntarily brought into state-court proceedings as a defendant to a qualifying claim can remove it.

II. Because a third-party counterclaim defendant qualifies as one of "the defendants" for purposes of removal, it follows *a fortiori* that such a party qualifies as "any defendant" for purposes of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4. But even if this Court disagrees with our position on the Section 1441 question, it should hold that a third-party defendant to a qualifying class-action counterclaim can remove that claim under 28 U.S.C. § 1453(b).

Our argument boils down to this: "any defendant" means any defendant. Congress could hardly have chosen clearer or more expansive language to define the class of defendants entitled to remove under Section 1453(b). This Court has repeatedly held that the

word "any" is expansive—and under any ordinary definition of the words, a third-party counterclaim defendant qualifies as any defendant. In enacting Section 1453(b), Congress expressly departed from several of the rules governing general removal. To the extent this Court finds that the phrase "the defendants" does not include a third-party counterclaim defendant for purposes of Section 1441(a), it should hold that the broader phrase "any defendant" in Section 1453(b) *does*.

Nothing in the other provisions governing removal supports a contrary conclusion. Courts of appeals have relied on 28 U.S.C. § 1446 to confine the class of defendants that qualify as "any defendant." But that provision merely sets out the procedures governing removal; it does not define *which defendants* are entitled to invoke those procedures. In any case, Congress expressly *departed* from certain aspects of Section 1446 in the text of Section 1453(b).

A plain-text reading of Section 1453(b) is also consistent with the purpose of CAFA, which was enacted to combat class-action abuses observed in state courts, and specifically to combat state-court biases against out-of-state defendants. The courts of appeals' constrained reading of CAFA's expansive language has created a huge loophole in the protections Congress intended and should be corrected by this Court with a reversal in this case.

ARGUMENT

Home Depot's argument is simple: a defendant is a defendant and "any defendant" means "any defendant." That is all you need to know to answer both questions presented. When a party is involuntarily brought into a state-court action as a defendant to a counterclaim, that party is a defendant and is entitled to remove a qualifying claim pursuant to 28 U.S.C. § 1441(a). When a party is involuntarily brought into a state-court action as a defendant to a class-action counterclaim, that party qualifies as "any defendant" and is entitled to remove a qualifying class action pursuant to 28 U.S.C. § 1453(b). The history and purposes of those provisions confirm that the statutory text means what it says.

I. This Court's Holding In *Shamrock Oil* That An Original Plaintiff Cannot Remove A Counterclaim Against It Should Not Apply To Third-Party Counterclaim Defendants.

The question presented in *Shamrock Oil & Gas Corp. v. Sheets* was whether the general removal statute then in operation authorized an original plaintiff in a state-court action to remove on the basis of diversity jurisdiction a counterclaim asserted by the defendant. 313 U.S. 100, 102-104 (1941). The answer was no. *Id.* at 106-109. In so holding, the Court relied on the text and purposes of the operative statute. The Court did not purport to address the removal rights of third-party counterclaim defendants—because no such defendant was present in that case. But the same considerations that led the Court to hold in 1941 that an original plaintiff cannot remove based on a counterclaim should lead the Court to hold now that a third-

party counterclaim defendant can remove an action that otherwise qualifies for removal under 28 U.S.C. § 1441.*

A. The Holding of *Shamrock Oil* Is Limited to the Removal Authority of an Original Plaintiff.

By its terms and reasoning, the holding of *Shamrock Oil* is limited: an original state-court *plaintiff* may not unilaterally remove a case based on a defendant's counterclaim. The rule of *Shamrock Oil* is an

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* As noted, when the Court granted the petition for a writ of certiorari, it directed the parties to address whether *Shamrock Oil*'s holding should "extend to third-party counterclaim defendants." Given the context of this case—and of the other question on which the Court granted review—Home Depot understands the Court's use of the term "third-party counterclaim defendant" to encompass a defendant that is brought into a case as a co-defendant to a counterclaim asserted against the original plaintiff. That is the sense in which Home Depot uses the term in this brief. We note, however, that Federal Rule of Civil Procedure 14 contemplates that a third-party defendant is one that "is or may be liable to" an original defendant "for all or part of the claim against it." Fed. R. Civ. P. 14(a)(1). Because Home Depot is not alleged to be liable for some or all of Jackson's debt to Citibank, it does not qualify as a third-party defendant under that definition. Home Depot was joined in this action pursuant to North Carolina Rule of Civil Procedure 13(h), which is closely modeled on Federal Rule of Civil Procedure 13(h). The Advisory Committee's historical notes to the federal rule clarify that Home Depot should be considered simply a "defendant" to the counterclaim. *See* Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment ("[F]or the purpose of determining who must or may be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be.").

original-plaintiff rule, not an original-defendant rule. The focus of the decision is on the rights of a plaintiff, the reasoning of the decision addresses the role of the plaintiff as distinct from the defendant, and the actual holding is therefore limited to addressing the removal rights of a plaintiff. But, as Judge Bybee explained in his concurring opinion in *Westwood Apex v. Contreras*, "[o]ver time, the holding of *Shamrock Oil*—that an original plaintiff could not remove the case after a counterclaim was filed—transformed [in the courts of appeals] into a rule that only the original defendant could remove the case." 644 F.3d 799, 808 (9th Cir. 2011). That extension is unjustified and incorrect. "*Shamrock Oil* does not compel" adoption of the original-defendant rule, *id.* at 807, and neither does the text of the general removal provision at issue in that case. This Court should clarify that a third-party counterclaim defendant—*i.e.*, a party that is a defendant to a counterclaim but is not a plaintiff in any capacity—has the same removal rights as other defendants in the case.

In *Shamrock Oil*, a Delaware corporation sued Texas citizens in Texas state court for an overdue bill, and the defendants responded with a counterclaim for an unrelated breach of contract. *Sheets v. Shamrock Oil & Gas Corp.*, 115 F.2d 880, 881 (5th Cir. 1940). Although the Delaware corporation had elected to file its claim in the Texas state court, it removed the action to federal court in response to the counterclaim. The question before this Court—a "question of statutory construction"—was whether the general removal provision then in effect authorized an original plaintiff to remove a case based on a counterclaim filed by the original defendant. *Shamrock Oil*, 313 U.S. at 103-

104. The Court answered that question by examining the text, history, and purposes of the operative removal statute.

The removal provision at issue in *Shamrock Oil*—like the general removal provision in operation today, 28 U.S.C. § 1441(a)—authorized removal "by the defendant or defendants" when certain other requirements were met. 313 U.S. at 104 & n.1 (quoting 28 U.S.C. § 71 (1940)); *see* 28 U.S.C. § 1441(a) (authorizing removal by "the defendant or the defendants"). In discerning the meaning of the statutory phrase "the defendant or defendants," the Court briefly surveyed the history of removal provisions. 313 U.S. at 104-106. The Court explained that Section 12 of the Judiciary Act of 1789 (1789 Act), ch. 20, § 12, 1 Stat. 73, 79, had similarly limited the right of removal to "the defendant"—and that nearly all revisions of the general removal provision since 1789 had limited "the privilege of removal to 'defendants' alone." 313 U.S. at 105; *id.* at 105-106. The only exceptions, the Court noted, were found in the general removal provisions in effect between 1867 and 1887. The 1867 act authorized removal by an out-of-state litigant, "whether he be plaintiff or defendant, if he" filed an affidavit attesting "that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court." Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559. The provision put in place in 1875 similarly authorized removal by "either party" and specified that removal based on diversity jurisdiction may be invoked by "any one or more of the plaintiffs or defendants." Removal of Causes Act, ch. 137, § 3, 18 Stat. 470, 471 (1875); *Shamrock Oil*, 313 U.S. at 105-106. But Congress amended that provision in

1887 to once again limit the right of removal to "the defendant or defendants," Act of Mar. 3, 1887 (1887 Act), ch. 373, § 1, 24 Stat. 552, 553, a limitation that remained in the version of the statute at issue in *Shamrock Oil* and continues in nearly identical form today, *see* 28 U.S.C. § 1441(a) (limiting removal to "the defendant or the defendants").

Relying on the House Report that accompanied the 1887 Act, the Court explained that the purpose of the amendment was "to narrow the federal jurisdiction on removal" by "'requir[ing] the plaintiff to abide his selection of a forum'" when a plaintiff sues in state court. *Shamrock Oil*, 313 U.S. at 106 n.2, 107 (quoting H.R. Rep. No. 49-1078, at 1 (1886)). In light of that statutory purpose, the Court construed the statute's restriction of removal authority to "the defendant or defendants" *not* to include an original plaintiff who later became a counterclaim defendant. *Id.* at 106-109. Such a party, although technically a defendant to the counterclaim, could not be considered "the defendant" in the case because that party had *chosen* the state-court forum. *Id.* at 107-108. The Court thus found "no basis for saying that Congress, by omitting from the [then-operative] statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others." *Id.* at 108.

The reasoning of *Shamrock Oil* makes sense as applied to an original plaintiff who becomes a counterclaim defendant. Because that party voluntarily submitted himself and his claim to the jurisdiction of the state court, it is perfectly fair to make that party "abide his selection of a forum," H.R. Rep. No. 49-1078, at 1. The Court's rule also avoids creating a textual mess of the removal statute by attempting to distin-

guish among different types of *plaintiffs* when determining who qualifies as "the defendant." But, for the reasons set out below, precisely the same considerations that justified the original-plaintiff rule announced in *Shamrock Oil* counsel *against* expanding *Shamrock Oil* to encompass an original-defendant rule.

B. The Text of Section 1441(a) Gives Third-Party Counterclaim Defendants the Right to Remove.

1. The text of Section 1441(a) is unambiguous in assigning the right of removal to defendants. Nothing in that provision—or in any other provision governing the rules and procedures of removal in diversity cases—even suggests that a third-party counterclaim defendant in a qualifying state-court action should not be treated as one of "the defendants" entitled to remove. 28 U.S.C. § 1441(a). And no provision governing removal limits the right of removal to an "original defendant." A third-party counterclaim defendant is brought into a suit through service of process, just as any other defendant, including the original defendant. And, as this Court reaffirmed in *Shamrock Oil*, the right of removal is granted to "a defendant against whom the suit is brought by process served upon him." 313 U.S. at 106; *see West v. Aurora City*, 73 U.S. (6 Wall.) 139, 142 (1868).

The holding in *Shamrock Oil* was motivated in part by the Court's inability to find a textual basis for permitting some, but not all, plaintiffs to remove. 313 U.S. at 108. The same consideration requires that the Court refrain from distinguishing among non-plaintiff defendants in determining which qualify as

"the defendants" under Section 1441(a). Any party that is brought into the state-court forum involuntarily as a defendant should qualify as a defendant that is entitled to remove where the rest of the removal requirements are satisfied.

Indeed, it is already the case that the right to remove is *not* limited to the parties originally named as defendants in the state-court action. Section 1446 provides that, "[i]f defendants are served at different times," a "later-served defendant" still has the right to remove. 28 U.S.C. § 1446(b)(2)(C). That rule applies to later-added defendants (*i.e.*, defendants not included in the plaintiff's original complaint). As Congress explained when it added Subsection (b)(2)(C) in 2011, "[f]airness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially." H.R. Rep. No. 112-10, at 14 (2011). The lower courts' adoption of the original-defendant rule is atextual in part because it would distinguish between later-joined defendants who are joined by the original plaintiff (and can remove) and later-joined defendants who are joined by an original defendant (and cannot remove)—even though nothing in any statutory provision governing removal provides a basis for that distinction. Those provisions distinguish between plaintiffs and defendants.

2. Adopting a common-sense interpretation of the phrase "the defendants"—one that recognizes a third-party counterclaim defendant as a defendant—also would not materially undermine existing restrictions on the right of plaintiffs to remove. Under

Shamrock Oil, a plaintiff who is the only defendant to a counterclaim has no right to remove but must instead abide his choice of forum. Because Section 1446 requires that all defendants consent to removal, 28 U.S.C. § 1446(b)(2)(A), a plaintiff who becomes one of multiple defendants to a counterclaim would still lack the right to unilaterally remove the action to federal court.

Under a correct reading of the statute, an original plaintiff that prefers removal based on a counterclaim will be able to take advantage of federal jurisdiction only when all the third-party defendants to the counterclaim file notices of removal or otherwise consent to removal. But that result is much more consistent with the federal removal scheme than a rule that would prevent third-party counterclaim defendants from removing. For one thing, the statutory scheme *already* allows certain parties that have no right to remove on their own to enjoy the benefit of removal by other parties they are aligned with. Section 1446 provides that a defendant that fails to file a notice of removal within the prescribed 30-day window (and therefore waives its right to remove) can nevertheless enjoy the benefits of removal if it acquiesces to a removal notice filed by a later-added defendant that does not miss its deadline. 28 U.S.C. § 1446(b)(2)(B), (C). That calculus reflects how important the right of removal is to every party brought into state-court proceedings against its will.

In addition, this Court has explained that one reason a plaintiff is not entitled to remove in response to a counterclaim is that the plaintiff should understand when he files in state court that a defendant has the right to assert a counterclaim—and when the plaintiff opts to file in state court anyway, he should be made

to stick with his choice. *West*, 73 U.S. (6 Wall.) at 142. The same can be said of an original defendant who asserts a counterclaim against the plaintiff *and* against third-party defendants: he should know that the third-party defendants have the right to remove if they all agree.

Determining whether a particular claim can form the basis of removal and who has the right to remove it should be made from the perspective of the claim itself. If a counterclaim satisfies the criteria for removing a case on the basis of diversity jurisdiction—a determination that will require assessment of, *inter alia*, the amount in controversy as to that claim and the extent to which the parties to that claim are diverse—it can provide the basis for removal. By the same token, if a party is an out-of-state *defendant* to a claim that can provide the basis of removal, that party is entitled to remove (assuming the timing and unanimity requirements are satisfied), even if the claim is asserted as a counterclaim. The only *exception* to that rule is when the defendant voluntarily invoked the jurisdiction of the state court by filing the original action in state court; such a party cannot later reject the state court's jurisdiction. Courts should determine which parties qualify as a "defendant" for removal purposes from the perspective of the claim—and should permit removal by defendants to a qualifying claim when those defendants did not voluntarily choose the state-court forum.

In sum, the federal statutes governing removal textually confer that right on "the defendants" in qualifying cases. The text in no way limits the right of removal to original defendants. Because a third-party counterclaim defendant is indisputably a defendant, it

should be entitled to remove under Section 1441(a) in the same way that any other defendant brought involuntarily into state-court proceedings can.

C. The History and Purposes of General Removal Provisions Confirm That Third-Party Counterclaim Defendants Have the Right to Remove Under Section 1441(a).

In addition to examining the text of the operative removal provision, the Court in *Shamrock Oil* considered the context that gave rise to that text: the history and purposes of federal removal statutes. 313 U.S. 104-109. That approach was consistent with how this Court addressed removal questions during the first century of the Republic. In keeping with that tradition, an examination of the history and purposes of removal compels the conclusion that the text of Section 1441(a) means what it says: a party that is a defendant and only a defendant has the right to remove.

1. The history of federal removal provisions is directly tied to the history of federal jurisdiction more generally, and to federal diversity jurisdiction in particular. The creation in Article III, Section 2 of federal judicial jurisdiction over "Controversies . . . between Citizens of different States" was animated by a concern about local prejudices that might disadvantage out-of-state litigants. U.S. Const. art. III, § 2. Indeed, the creation of federal courts more generally was in part a response to "the friction between individual states which came to the surface after the danger of the common enemy had disappeared." Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 8 (2d ed. 2007). In the debates surrounding the Constitu-

tional Convention, James Madison argued that federal jurisdiction over disputes between citizens of different States was important because "a strong prejudice may arise, in some states, against the citizens of others, who may have claims against them." 3 *Elliot's Debates* 533 (2d ed. 1836). Alexander Hamilton echoed that concern, arguing that "the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens" because a federal court "will be likely to be impartial between the different states and their citizens." *The Federalist No. 80*, at 537 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). This Court has also explained, in reference to the 1789 Act, that "[o]ne great object in the establishment of the Courts of the United States and regulating their jurisdiction was, to have a tribunal in each state, presumed to be free from local influence; and to which all who were nonresidents or aliens might resort for legal redress." *Gordon v. Longest*, 41 U.S. (16 Pet.) 97, 104 (1842). As a matter of logic, the Framers' concern about local bias extends equally to original out-of-state defendants and to out-of-state third-party defendants.

Although the Framers established in the Constitution the jurisdictional boundaries of the lower federal courts, they left it to Congress to determine both how to structure those courts and how much of the federal judiciary's potential jurisdiction to actualize at any point in time. The first Congress turned to that task immediately by enacting the 1789 Act. Because the Act reflected a compromise between Federalists and Anti-Federalists, *see* Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609, 616-617 (2004), it did not authorize lower federal courts to exercise the full range of jurisdiction recog-

nized in the Constitution, instead leaving significant areas of potential federal jurisdiction in the hands of state courts. With respect to diversity jurisdiction, Section 11 of the 1789 Act gave federal courts concurrent (with state courts) jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars" and "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." § 11, 1 Stat. at 78.

2. In the same Act that first endowed lower federal courts with diversity jurisdiction, Congress created the right of removal in cases that would have satisfied the criteria for diversity jurisdiction but were filed in state court. Section 12 of the 1789 Act provided that "if a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, . . . the defendant" may file a petition of removal to the appropriate federal court and "the cause shall there proceed in the same manner as if it had been brought there by original process." § 12, 1 Stat. at 79.

This Court has repeatedly held that Congress's goal in creating removal jurisdiction was to protect a defendant's right to invoke the protections afforded by federal jurisdiction in appropriate cases. As the Court explained in *Martin v. Hunter's Lessee*:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised

> exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

14 U.S. (1 Wheat.) 304, 348 (1816). The Court has also explained that Congress initially created removal jurisdiction in part for the same reason it created lower federal courts: to protect against local bias and prejudices that might disadvantage an out-of-state party in state-court litigation. *See Gaines v. Fuentes*, 92 U.S. 10, 19 (1876); *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 289 (1872). An out-of-state third-party defendant is just as susceptible to bias as any out-of-state defendant.

Even when Congress amended the general removal provision in 1867 and again in 1875 to permit both plaintiffs and defendants to remove, it sought to protect against local prejudice. As this Court explained at the time, in reference to the 1867 statute, "the experience of parties immediately after the [Civil W]ar, which powerfully excited the people of different States, and in many instances engendered bitter enmities, satisfied Congress that further legislation was required fully to protect litigants against influences of that character." *Gaines*, 92 U.S. at 19. In 1887, when that heightened risk of local prejudice had subsided, Congress restored earlier removal restrictions by once again expressly limiting the right of removal to out-of-state defendants. 1887 Act § 1, 24 Stat. at 553. That restriction remains today. 28 U.S.C. § 1441.

Although the 1887 version of the general removal provision referenced local prejudice as an alternative

ground for removing a suit between citizens of different States, 24 Stat. at 553, modern versions of the general removal statute no longer provide that alternative or require an express showing of reason to fear local prejudice as a justification for giving defendants the right to remove. As the "Historical and Revision Notes" to Section 1441 explain, when the laws governing general removal were codified as Section 1441, "[a]ll the provisions with reference to removal of controversies between citizens of different States because of inability, from prejudice or local influence, to obtain justice, [were] discarded" because they "have no place in the jurisprudence of a nation since united by three wars against foreign powers." 28 U.S.C. § 1441 note. But modern removal continues to guard against potential prejudice by authorizing diversity-based removal by out-of-state defendants. And some specialized removal provisions are still designed to combat local prejudice. *See* p. 43, *infra*. More generally, modern removal provisions continue to serve the other longstanding animating purpose of removal: protecting a defendant's right to invoke original federal jurisdiction in a suit over which state and federal courts have concurrent jurisdiction.

3. Significantly, the Court has long understood that *both* plaintiffs and defendants should have the right to invoke federal diversity jurisdiction in a qualifying case—*but* that a plaintiff's right to do so is protected in a different manner than a defendant's. In controversies over which a federal court would have diversity jurisdiction, a plaintiff may protect its right to invoke federal jurisdiction by filing the suit in federal court. But when such a plaintiff instead invokes the concurrent jurisdiction of a state court, Congress

has sought through removal jurisdiction to protect the defendant's right to invoke federal diversity jurisdiction. Discussing the earliest forms of removal jurisdiction, the Court explained that the "protection" that diversity jurisdiction provides "to non-residents of a State was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a State court a like election to the defendant afterwards." *Ry. Co.*, 80 U.S. (13 Wall.) at 289. With respect to Section 12 of the 1789 Act in particular, the Court has noted that the right of removal was "given to the defendant only, as the plaintiff, when he initiates his suit, may elect in which of the two concurrent jurisdictions he prefers to go to trial." *Case of the Sewing Mach. Cos.*, 85 U.S. (18 Wall.) 553, 573-574 (1874).

The original-plaintiff rule of *Shamrock Oil* perfectly reflects the essential nature of removal: the right of removal is limited to defendants brought into state court involuntarily as a counterbalance to the plaintiff's preexisting right to elect the judicial forum at the outset. If a plaintiff were entitled to remove after choosing the state forum, it would get two bites at the federal-election apple. Congress could have created that type of removal scheme (and did between 1867 and 1887), but it has chosen instead to give each party one opportunity to elect a federal forum for an action over which state and federal courts have concurrent jurisdiction. A party that "voluntarily resort[s], as [a] plaintiff[], to the State court . . . [is] bound to know of what rights the defendants to [its] suit might avail themselves under" the rules governing proceedings in that State. *West*, 73 U.S. (6 Wall.)

at 142. When such a plaintiff "[s]ubmit[s]" itself to the state court's "jurisdiction [it] submit[s itself] to it in its whole extent." *Ibid.* Appropriate respect for "[t]he power reserved to the states under the Constitution to provide for the determination of controversies in their courts," *Shamrock Oil*, 313 U.S. at 108-109, has prompted Congress to preserve concurrent jurisdiction and to grant to federal courts something *less* than the full extent of original jurisdiction allowed by the Constitution. The same respect supports the rule that a party that voluntarily invokes state process should abide by its choice.

But the exact same considerations explain why the original-plaintiff rule of *Shamrock Oil* should not be misconstrued as an original-defendant rule—*i.e.*, should not be extended to prevent removal by a third-party counterclaim defendant. A third-party defendant to a counterclaim is not a plaintiff under any definition of that word. It is a defendant and only a defendant, brought into a case through service of process just like any other defendant. *See West*, 73 U.S. (6 Wall.) at 141, 142. A third-party counterclaim defendant has no role in choosing a state-court forum. And, just like any other state-court defendant in a suit over which a federal court could exercise original jurisdiction, a third-party counterclaim defendant has a statutory right to elect to proceed in federal court.

This Court has long understood the importance of an out-of-state defendant's right to remove. More than a century ago, in holding that a state-court plaintiff cannot frustrate an out-of-state defendant's removal right by failing to correctly identify the defendant's State of citizenship, the Court explained that a plaintiff "cannot cut off defendant's constitutional *right* as

a citizen of a different State than the plaintiff, *to choose a Federal forum*." *Tex. & Pac. Ry. Co. v. Cody*, 166 U.S. 606, 609 (1897) (emphases added). The Court later explained that the 1888 predecessor to modern removal provisions "withheld the right of removal from the plaintiff, who always has a choice of forums, and gave the right to the [out-of-state] defendant." *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 660 (1923).

The purpose of the federal removal scheme is *not* to protect a plaintiff's right to choose a state forum; it is to give to the *defendant* the same right to choose a federal forum where original federal jurisdiction exists that the plaintiff has when he files the initial suit. A plaintiff can waive his right to choose a federal forum by filing suit in state court—and under *Shamrock Oil*, that waiver applies both to the plaintiff's claims against the defendant and to the defendant's counterclaims against the plaintiff. But a plaintiff's election of an initial state forum should not have the effect of waiving a *different* party's right to elect a federal forum to adjudicate a counterclaim when that party is involuntarily brought into the case as a third-party defendant.

Treating *Shamrock Oil*'s original-plaintiff rule as an original-defendant rule—as nearly all federal courts of appeals have done—makes no sense in light of the history and purposes of removal. It also has no basis in the text of Section 1441(a) or its predecessor statutes. The original defendant is not the only defendant who is hauled into state court against its will. And the original defendant is not the only defendant who has a right to have a qualifying controversy adjudicated in federal court. Third-party counterclaim

defendants and original defendants are in *exactly the same situation* with respect to such considerations. And unless or until Congress provides a statutory basis for distinguishing between the two groups, third-party counterclaim defendants should have the same removal rights as original defendants. This Court should therefore hold that the rule of *Shamrock Oil* does not extend to third-party counterclaim defendants.

II. The Class Action Fairness Act Of 2005 Independently Authorizes A Third-Party Class-Action Counterclaim Defendant To Remove A Qualifying Class Action.

If this Court holds, as it should, that a third-party counterclaim defendant has the right to remove under Section 1441(a)—because it is a defendant and therefore qualifies as one of "the defendants"—it follows *a fortiori* that a third-party defendant to a qualifying class-action counterclaim is entitled to remove pursuant to 28 U.S.C. § 1453(b), which was enacted as part of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, and gives "any defendant" the right to remove. The courts of appeals' unanimous holdings to the contrary are premised on the misperception that *Shamrock Oil* defined the word "defendant" in all removal provisions to mean only a defendant to the original plaintiff's claims. For the reasons discussed above, that interpretation is incorrect. But even if this Court were to hold that a third-party counterclaim defendant cannot remove under Section 1441(a) because the phrase "the defendant or the defendants" includes only defendants to the original plaintiff's claims, that would not answer the other question presented. Regardless of how the Court

resolves the Section 1441 issue, it should hold that a third-party counterclaim defendant to a qualifying class action *can* remove under Section 1453(b)—because that provision uses a different phrase to describe the parties entitled to remove and was enacted for the express purpose of making it easier for class-action defendants to remove.

A. The Text of Section 1453(b) Confirms That a Third-Party Defendant to a Class-Action Counterclaim Can Remove.

The Fourth, Sixth, Seventh, and Ninth Circuits agree: the statutory term "any defendant" in Section 1453(b) does not mean what it says. Those courts are wrong and their decisions should be reversed or abrogated.

1. The courts of appeals' narrow interpretation of removal authority under CAFA has no basis in the text of that statute or in the text of any related removal provision. As always, statutory interpretation must begin with the plain text of a statute, "assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)) (brackets in original). In that endeavor, the Court has emphasized that it "must enforce plain and unambiguous statutory language according to its terms." *Ibid.*

As relevant here, CAFA provides that a class action satisfying certain requirements "may be removed to a district court of the United States in accordance with" 28 U.S.C. § 1446, "except that such action may be removed *by any defendant* without the consent of

all defendants," *id.* § 1453(b) (emphasis added). The statutory language at issue—"any defendant"—could scarcely be clearer. The word "any" means "one or some indiscriminately of whatever kind," *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)); the word "defendant" means "[a] person sued in a civil proceeding," *Black's Law Dictionary* 508 (10th ed. 2014); *see also* Fed. R. Civ. P. 20(a)(2)(A) (providing that persons "may be joined in one action as defendants if . . . any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction[or] occurrence"). This Court held in *Mississippi ex rel. Hood v. AU Optronics Corp.*, that when Congress used "plaintiffs" in CAFA, it intended the term to have its ordinary meaning as used in the Federal Rules of Civil Procedure. 571 U.S. 161, 169-170 (2014). There is no reason "defendant" in CAFA's removal provision should be given any different treatment—and the Rules plainly consider a third-party defendant that is an original defendant to a counterclaim to be a "defendant." *See, e.g.*, Fed. R. Civ. P. 12. Home Depot indisputably qualifies as "any defendant" under the ordinary meaning of that phrase.

By granting the right of removal to "any defendant" in Section 1453(b), Congress significantly departed from Section 1441(a), which restricts removal power to "the defendant or the defendants." When Congress enacted Section 1453(b), courts of appeals had overwhelmingly held that Section 1441(a) does not permit third-party counterclaim defendants to remove. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty

years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants . . . ."). But Congress chose to use a *different* phrase to define the class of defendants entitled to remove in Section 1453(b). "[U]sually at least, when [this Court is] engaged in the business of interpreting statutes [the Court] presume[s] differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017).

In choosing to depart from the language of Section 1441(a), Congress could hardly have chosen a more expansive word than "any" to define the class of defendants entitled to remove. "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (quoting *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969) (en banc)). In contrast, as noted, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Gonzales*, 520 U.S. at 5 (quoting *Webster's Third*, *supra*, at 97). Accordingly, "Congress' use of 'any' to modify '[defendant]'" in CAFA "is most naturally read to mean [defendants] of whatever kind." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008). Home Depot is a defendant "of whatever kind" in this matter—in fact, its *only* role in this litigation is as a defendant to class-action claims. Under the plain meaning of Section 1453(b), therefore, Home Depot should have been permitted to remove this case to federal court.

2. The reasons offered by the courts of appeals to support their contrary conclusions do not hold water.

a. First, courts of appeals have unanimously misconstrued *Shamrock Oil* as defining the word "defendant" in all removal statutes to include only defendants to an original plaintiff's claims. As discussed, that is an incorrect interpretation of *Shamrock Oil*. But even if this Court views *Shamrock Oil* as precluding removal by a third-party counterclaim defendant, that rule would apply only to Section 1441(a) (the successor to the provision at issue in *Shamrock Oil*), which uses the phrase "the defendant or the defendants," not "any defendant."

Because of potentially overly broad language in *Shamrock Oil*, courts of appeals have erroneously viewed that decision as defining the word "defendant" in removal provisions. *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 355 (7th Cir.) (explaining that *Shamrock Oil* "established" the meaning of "the term 'defendant'"), *cert. denied*, 137 S. Ct. 2138 (2017); *Westwood Apex*, 644 F.3d at 804 (9th Cir.) (noting that *Shamrock Oil* "established [the] meaning of 'defendant' in Chapter 89 of the Judicial Code"); *see* Pet. App. 9a; *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 853 (6th Cir. 2012); *Palisades*, 552 F.3d at 334-335 & n.4 (4th Cir.). The circuit courts' understanding of the holding of *Shamrock Oil*—which extends beyond both the question presented and the statutory text at issue in *Shamrock Oil*—is based on a misunderstanding of particular language in the Court's opinion. In the course of explaining the evolution of the general removal statute, for example, the Court noted that Congress had for the most part "given the privilege of

removal to 'defendants' alone." *Shamrock Oil*, 313 U.S. at 105; *see id.* at 107.

Of course, the Court in *Shamrock Oil* had no occasion to consider whether the statutory term "the defendants" would encompass a party who was not an original plaintiff, did not voluntarily submit itself to the jurisdiction of the state court on a claim that could be heard in federal court, and could not be described as a "plaintiff" in any sense of that word. Moreover, none of the reasoning the Court employed to explain its holding that an original *plaintiff* could not remove a case under the general removal statute would apply to a party that was brought into a matter through service of process as an original defendant to a counterclaim: such a party did not select the state-court forum, *Shamrock Oil*, 313 U.S. at 106 n.2, and permitting removal by such a party would not "save a right of removal to some plaintiffs and not to others," *id.* at 108. Thus, regardless of how the Court resolves the application of Section 1441(a) to third-party counterclaim defendants, the Court should not view *Shamrock Oil* as defining "defendant" in all removal statutes going forward.

Because courts of appeals view *Shamrock Oil* as setting in stone the definition of "defendant" (albeit an incorrect definition) for all removal statutes, they have felt bound to ignore the plain meaning of the phrase "any defendant." *See, e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354 (relying on explanation in *First Bank v. DJL Properties, LLC*, that "'[a]ny' is inclusive, to be sure, but the word that it modifies remains 'defendant' [as defined] under *Shamrock Oil*," 598 F.3d 915, 917 (7th Cir. 2010)). The Seventh Circuit has explained that, "[i]f the drafters of [CAFA] wanted to negate

Shamrock Oil, they could have written 'defendant (including a counterclaim defendant)'" but instead "chose the unadorned word 'defendant,' a word with a settled meaning." *First Bank*, 598 F.3d at 917; *see Tri-State Water Treatment*, 845 F.3d at 354 ("*First Bank* does much of the work that is necessary to resolve the present appeal."). This Court has expressly *rejected* that type of could-have reasoning to circumvent the plain meaning of statutory text. In the course of interpreting the phrase "any other law enforcement officer" in *Ali*, this Court explained:

> Petitioner would require Congress to clarify its intent to cover all law enforcement officers by adding phrases such as "performing any official law enforcement function," or "without limitation." But Congress could not have chosen a more all-encompassing phrase than "any other law enforcement officer" to express that intent. We have no reason to demand that Congress write less economically and more repetitiously.

Ali, 552 U.S. at 221. So too here: there is no reason to demand that Congress specify each type of defendant who may remove under CAFA when Congress has already specified that *any defendant* may remove under CAFA. Home Depot is a defendant. Indeed, from Home Depot's perspective, the class action claims are not "counter" to anything—they are simply class-action claims asserted against Home Depot and other defendants. Home Depot is the defendant to those claims under any ordinary meaning of that term. *See* Fed. R. Civ. P. 12; *see also* Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment (noting that, "for the purpose of determining who must or may

be joined as additional parties to a counterclaim or cross-claim, the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be").

b. Second, courts of appeals have reasoned that the word "defendant" in Section 1453(b) must be construed to mean the same thing that it means in 28 U.S.C. § 1446(b), which sets forth the procedures for removal and uses the phrase "the defendant." *See, e.g.*, *Tri-State Water Treatment*, 845 F.3d at 354; *Westwood Apex*, 644 F.3d at 806; *Palisades*, 552 F.3d at 334-335. That explanation ignores the structure and text of the operative statutes.

As a structural matter, it makes little sense to limit the scope of Section 1453(b)'s definition of the class of defendants eligible to remove based on the language of Section 1446, which prescribes the procedures for effectuating a removal. Unlike Sections 1441(a) and 1453(b), Section 1446 does not define, expand, or restrict the category of defendants entitled to remove. Section 1446 simply establishes the procedures under which a qualifying defendant can remove. Section 1453(b) establishes which defendants can remove a qualifying class action ("any defendant"); Section 1441(a) establishes which defendants can remove a qualifying civil action ("the defendant or the defendants"); and Section 1446(a) provides the mechanism for removal by "[a] defendant or defendants desiring to remove any civil action from a State court." If either Section 1453(b) or Section 1441(a) empowers a defendant to remove a case, that defendant must follow the procedures in Section 1446(a).

Courts' reliance on Section 1446 also makes little sense in light of Section 1453(b)'s express instruction

that courts should *depart* from the default rules in Section 1446(b). Section 1453(b) provides that a class action may be removed "in accordance with" Section 1446 "*except that* such action may be removed by *any defendant* without the consent of all defendants." 28 U.S.C. § 1453(b) (emphases added). Congress could not have been clearer in expressing its intent to establish removal authority for class actions that is *different* in scope from the general removal authority set forth in Sections 1441 and 1446.

Some courts of appeals, including the court below, Pet. App. 7a (citing *Palisades*, 552 F.3d at 335), have dismissed Congress's use of an "except" clause by noting that the phrase following "except" has the effect of departing from Section 1446's baseline rule that a defendant cannot remove a case without the consent of all other defendants. It is true that part of the text that follows "except" accomplishes that goal—by specifying that a defendant can remove an eligible class action "without the consent of all defendants." 28 U.S.C. § 1453(b). But Congress *also* used the phrase "any defendant" to describe the degree to which CAFA removal is "except[ed]" from the background removal principles. The introduction of the phrase "any defendant" (rather than "the defendant" as used in Sections 1441(a) and 1446(b)) would have no purpose—indeed, would be superfluous—if Congress's only goal was to depart from the unanimity rule, a goal it accomplished unambiguously with different statutory text.

c. Finally, the court of appeals below justified its counter-textual reading of "any defendant" by hypothesizing that construing the phrase "any defendant" in its ordinary sense (*i.e.*, to include any defendant) would "invite gamesmanship" by permitting a class-

action defendant that was an original plaintiff "to disrupt unfavorable proceedings in state court." Pet. App. 13a. That reasoning is wrong for two reasons.

First, it ignores that Congress's purpose in enacting CAFA was to permit "any" class-action "defendant" to disrupt unfavorable state-court class-action proceedings. As this Court recently explained in *Dart Cherokee Basin Operating Co. v. Owens*, any anti-removal presumption that might exist with respect to ordinary diversity jurisdiction does not "attend[] cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. 547, 554 (2014).

Second, as explained more fully below, the rule adopted by four courts of appeals invites gamesmanship by class-action plaintiffs, not by class-action defendants. A wily plaintiffs' attorney need only wait for a potential class-action defendant—or, as here, for any other party loosely affiliated with such a potential defendant—to file a run-of-the-mill state-court collection action that can then be transformed into a vehicle for a non-removable class action. That cannot be what Congress intended when it enacted CAFA—and it cannot be what this Court intended when it decided *Shamrock Oil*.

B. Preventing Third-Party Counterclaim Defendants from Removing Class Actions Under Section 1453(b) Significantly Undermines the Purpose of CAFA.

Congress enacted CAFA because the existing "diversity and removal standards as applied in interstate class actions have facilitated a parade of abuses" by preventing large class actions from being adjudicated

in federal court. Senate Report 6. Because existing "law enable[d] plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court," *id.* at 10, Congress eased the requirements of removal in the hope of "minimiz[ing] the class action abuses taking place in state courts and ensur[ing] that these cases can be litigated in a proper forum," *id.* at 27; *see id.* at 26 ("Under current law, . . . plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level.").

This Court directed in *Dart Cherokee* that "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" 135 S. Ct. at 554 (quoting Senate Report 43). But the lower courts' narrow reading of Section 1453(b) significantly undermines Congress's purpose by creating a giant "loophole" in CAFA's protections "that only [this] Court can now rectify." *Palisades*, 552 F.3d at 345 (Niemeyer, J., dissenting from the denial of rehearing en banc). Indeed, one commenter has noted that the term "'loophole' may not be an adequate term" because the "rule adopted by" the courts of appeals "is tantamount to a determination that CAFA's removal provision simply has no application to the very substantial proportion of class actions that can be pleaded as counterclaims." Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, at 2 (Himmelfarb).

In particular, as with early versions of the general removal statute, one of CAFA's principal aims was to combat prejudice against out-of-state defendants.

CAFA § 2, 119 Stat. at 5 (codified at 28 U.S.C. § 1711 note) ("Findings" of CAFA include that "State and local courts are . . . sometimes acting in ways that demonstrate bias against out-of-State defendants"). The Senate Report accompanying CAFA explained that the Framers viewed diversity jurisdiction as essential in guarding against such prejudice. Senate Report 8-9. After cataloguing the types of anti-defendant class-action abuses observed in state courts, the Report explained that, "[g]iven the range and severity of class action abuse, it is not surprising that defendants find it necessary to remove actions against them to a federal forum—a forum where the threat of prejudice is significantly lower." *Id.* at 26. To combat the observed biases against out-of-state defendants, Congress expanded both the reach of diversity jurisdiction and the category of defendants entitled to remove in qualifying class actions.

CAFA has been described as "the most significant legislative reform of complex litigation in American history." Lonny Sheinkopf Hoffman, *Burdens of Jurisdictional Proof*, 59 Ala. L. Rev. 409, 410 (2008). But the decisions of the Fourth, Sixth, Seventh, and Ninth Circuits provide a roadmap for circumventing the clear purpose of the Act. A plaintiffs' attorney need not even be particularly enterprising to find a debt-collection proceeding or other minor state-court litigation to use as a vehicle for asserting an interstate class-action claim against an entity that is not even a party to the state-court action. The risk of such behavior is particularly high for class actions asserting consumer-protection claims—a category that comprises a significant percentage of all class actions eligible for federal jurisdiction. Himmelfarb 2. From the perspec-

tive of that class-action defendant, the commencement of a class action as a counterclaim is no different from the commencement of a stand-alone state-court class action—*except* that the counterclaim class action is not removable under the prevailing view of CAFA.

Experience shows that the "unfortunate loophole" Judge Niemeyer warned about in his opinion dissenting from the court's denial of rehearing in *Palisades*, 552 F.3d at 345, has significantly undermined the goals of CAFA. Shortly after CAFA was enacted, a consultant who advised the class-action plaintiff (*i.e.*, the original defendant) in *Palisades* published a law review article encouraging class-action lawyers to exploit this loophole by filing their claims as counterclaims. Jay Tidmarsh, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193 (2007) (Tidmarsh). The author explains that "a consumer wishing to hold onto the state forum" for his class-action claim can evade CAFA's removal provisions by "filing a counterclaim class action." *Id.* at 198. Using that "tactic," the article boasts, "the state case suddenly transforms from an individual action with $75,000 or less at stake into a class suit with more than $5,000,000 at stake." *Id.* at 199. The author noted that, although that tactic had already been employed a number of times in the first two years after CAFA's enactment, those cases represented "just the tip of an approaching iceberg." *Ibid.*

The stakes for retailers such as Home Depot are high. Home Depot did not choose the state-court forum in this case and had no control over whether or where the original plaintiff filed its collection action. But because Jackson used the counterclaim tactic to

avoid the removal jurisdiction that CAFA affords, Home Depot is stuck litigating a large class action in a state court of someone else's choosing. Indeed, this is the second class action filed against Home Depot in less than a year that uses this removal-avoiding technique—and the other one was filed in Madison County, Illinois, one of the jurisdictions Congress identified as a "'magnet' jurisdiction[]" for abusive class actions. Senate Report 13; *Tri-State Water Treatment*, 845 F.3d at 352. The stakes for financial institutions are just as high. As the class-action consultant warned in his 2007 article, "financial institutions will need to think carefully before they file collection actions in state courts in which they do not wish to defend their credit and lending policies" against class-action claims. Tidmarsh 199. In this very case, Citibank (the original plaintiff) ultimately abandoned its collection action to avoid being enmeshed in the state-court class action. Class actions were not created for the purpose of deploying that type of coercive pressure—and Congress certainly did not intend to facilitate such behavior when it cracked down on class-action abuses by enacting CAFA.

In the end, this case is a perfect illustration of the gamesmanship prompted by the courts of appeals' misreading of Section 1453(b). After Citibank dropped its collection claims against Jackson, Jackson dropped his class-action claims against Citibank. That leaves us with *only* Jackson's class-action claims against Home Depot and CWS. That is precisely the type of class action Congress intended to be removable under CAFA. But because Jackson was able to initiate his claims as a counterclaim, the courts below held that the class

action must stay in state court. Those holdings should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1441 provides in relevant part:

§ 1441. Removal of civil actions

(a) GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

* * *

28 U.S.C. § 1446 provides in relevant part:

§ 1446. Procedure for removal of civil actions

(a) GENERALLY.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) REQUIREMENTS; GENERALLY.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

* * *

28 U.S.C. § 1453 provides in relevant part:

§ 1453. Removal of class actions

* * *

(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

* * *

No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

For at least 70 years, the consensus among federal courts has been that "defendants," particularly in the context of removal, means parties against whom the plaintiff has brought claims—not counterdefendants or other third parties joined in the case by a defendant. Congress has long legislated against that backdrop, using terms such as "counterclaim defendants" or "party" rather than "defendants" when it intends to refer to additional types of parties—and using "defendants" when it doesn't. Petitioner Home Depot U.S.A., Inc. asks this Court to upend this long-established common understanding that underpins every removal statute.

The questions presented are:

1. Should this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?

2. May parties added to a case through counterclaims or third-party claims, who were not "defendants" to "a civil action brought in a state court" under 28 U.S.C. § 1441(a), nonetheless remove to federal court the entire action containing the class counterclaim(s) pled against them based only on the placement of "any" in front of the word "defendant" in 28 U.S.C. § 1453(b)?

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INTRODUCTION

Since 1789, Congress has limited who may transfer actions from state to federal court. And with few exceptions, Congress has granted this right of removal only to "defendants." The term "defendant" in the removal context has a well-settled meaning across statutes, caselaw, and treatises: someone against whom a plaintiff brings claims. The consensus among federal courts that counterdefendants may not remove under 28 U.S.C. § 1441(a) flows directly from this well-established meaning of "defendant."

Limiting removal to "defendants" is not the only restriction Congress placed on removal jurisdiction under § 1441(a) that prevents removal based on counterclaims. Congress also limited removal jurisdiction to cases over which the federal courts would have had "original jurisdiction." This Court has long held that this restriction limits removal to cases in which *the plaintiff's* complaint could have been filed in federal court—and therefore cases cannot be removed based on a defense or a counterclaim.

Nothing in the Class Action Fairness Act alters these two restrictions. Civil actions—be they class actions or individual cases—may only be removed under § 1441(a) by "defendants," and they may only be removed if they could have been filed in federal court by the plaintiff in the first place.

Neither of these requirements is met here. This Court, therefore, should affirm.

STATEMENT OF THE CASE

A. Home Depot, Carolina Water Systems, and Citibank's Water-Treatment Scam.

1. This case arises from a coordinated scam by Home Depot U.S.A., Inc., Carolina Water Systems, Inc. ("CWS"), and Citibank, N.A., that uses deceptive, high-pressure, and flat-out prohibited tactics to sell, on credit, unneeded home water-treatment systems at extraordinary mark-ups to North Carolina homeowners.

The scam begins with a phone call from a Home Depot/CWS representative, who tells the homeowner that "contaminants" were found in nearby tap water. JA56-57.[1] The representative persuades the consumer to allow a home visit to "test" their water. JA57.

The test is a pretext for a multi-hour scripted sales pitch packed with deceptive tactics. The test itself checks only for water hardness; virtually all tap water, whether dangerous or not, will test "positive." JA60. Nevertheless, backed by charts and graphs, the representative falsely indicates that the positive test result means that the homeowner's tap water is contaminated and unsafe. JA57-58.

Playing on the fear created by this false information, the Home Depot/CWS representative, if successful, sells the homeowner on the need for a wildly overpriced home water-treatment system. The

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[1] The Joint Appendix is cited herein as "JA." Unless otherwise stated, all underlying facts are as alleged by Respondent George Jackson. Unless otherwise specified, all internal quotation marks and citations omitted.

system Home Depot/CWS sells as part of this scam for approximately $9,000 can be purchased elsewhere for less than $1,400. JA31.

If the homeowner balks at the system's cost, the Home Depot/CWS representative suggests several "solutions." First, the representative tells the consumer that sales tax will be waived if the consumer purchases the system that day. JA58; *see also* Dist. Ct. Dkt. No. 16-1, at 4 (describing lack of tax as a "promo"). But that's misleading at best: Under North Carolina law, these water-treatment systems are *never* subject to sales tax. JA58.

Second, the representative tells the consumer that, if they refer enough other consumers who end up purchasing the system, their water-treatment system will be free. JA58. Under this referral program, the homeowner would also get credit toward the purchase price for every referral who agreed to listen to the sales pitch, even if they didn't purchase the system. JA58. But offering free or reduced cost products in exchange for referrals is categorically prohibited under North Carolina's Referral Sales statute, which provides that sales "at a price or with a rebate or payment or other consideration to the purchaser that is contingent upon the procurement of prospective customers provided by the purchaser, . . . is declared to be unlawful. Any obligation of a buyer arising under such a sale shall be void and a nullity[.]" N.C.G.S. § 25A-37.[2]

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[2] Referral sales schemes—where a sale is induced by telling the consumer the cost will be reduced or free if they refer others—are prohibited, in North Carolina and elsewhere, because the promised benefits so infrequently materialize. *See,*

But the referral scheme isn't the only way the Home Depot/CWS representative offers to "help" make the system affordable: The representative also tells the consumer they are approved for a Home Depot-branded deferred-interest Citibank credit card with a credit limit that, conveniently, exactly matches the cost of the system less any down payment ($8,900 in Mr. Jackson's case). *See* Dist. Ct. Dkt. No. 13-2, at 2; JA27. In other words, consumers who purchase these systems from Home Depot/CWS do not get financing from some lender they find on their own. Instead, as part of a package deal, the overpriced water treatment systems come with specific overpriced financing provided by Citibank.

Completed transactions with successfully coerced homeowners involve three separate contracts to purchase, install, and finance the water-treatment systems: with CWS for the purchase and installation of the system, with Home Depot for the installation, and with Citibank for a credit card with a limit exactly matching the financing needed for the system. *See* JA32; Dist. Ct. Dkt. No. 16-1, at 4-6; Dist. Ct. Dkt. No. 30-1, at 2-13; Dist. Ct. Dkt. No. 13-1, at 2; Dist. Ct. Dkt. No. 13-2, at 2.

Home Depot, CWS, and Citibank carried out this scam throughout North Carolina, but similar scams

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e.g., Ralph Rohner, *Leasing Consumer Goods: The Spotlight Shifts to the Uniform Consumer Leases Act*, 35 Conn. L. Rev. 647, 717-18 (2003) (explaining why the Uniform Consumer Leases Act prohibits such sales); Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 Ohio St. L.J. 437, 453 n.97 (1991) (citing case examples). Such referral sales schemes are also prohibited by the Uniform Consumer Sales Practices Act. U.C.S.P.A. § 3(b)(11).

have also been perpetrated in other states. In Florida, for example, state Attorney General Pam Bondi has warned consumers not to believe claims that their water is dangerous or that water-treatment systems are needed on the basis of in-home tests by salespeople. JA61 n.1. In Illinois, Home Depot partnered with a local water system seller-installer for the same basic scheme as the one here. *See Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 352 (7th Cir. 2017). When Home Depot and its *amici* complain here that Home Depot has been subject to another class claim arising out of a state-court debt collection action, they are referring to *Tri-State Water*.

2. Mr. Jackson was subjected to the typical Home Depot/CWS sales tactics described above. *See* Dist. Ct. Dkt. No. 24-1. Mr. Jackson was persuaded by the representative's statements that he needed a water-treatment system to avoid carcinogens in his water, but protested that he couldn't afford the system. *Id.* at 3-4. In response, the representative told Mr. Jackson that if six of Mr. Jackson's referrals purchased a water-treatment system, his system would be free. JA27; *see* Dist. Ct. Dkt. No. 24-1, at 3; Dist. Ct. Dkt. No. 30-1, at 2. Further, the representative said Mr. Jackson would receive compensation for any referrals that listened to the sales presentation. *Id.*; Dist. Ct. Dkt. No. 24-1, at 4; JA26.

In the meantime, the representative went on, Mr. Jackson would qualify for financing arranged by Home Depot (with its partner in this enterprise, Citibank). Dist. Ct. Dkt. No. 24-1, at 4. The Home Depot/CWS representative falsely stated that Mr.

Jackson would have two years in which to pay off the financing interest-free. *Id.*; *see* Dist. Ct. Dkt. No. 16-1, at 4. In fact, the interest-free period on the Home Depot-branded Citibank credit card was only one year before the interest rate jumped to 25.99%. Dist. Ct. Dkt. No. 13-2, at 4.

Mr. Jackson signed three separate contracts for the water-treatment system and its financing, one with each of the three players. As is typical in this scam, however, he did not sign (or even have a chance to review) the Home Depot or Citibank agreements until after his system had been installed. *See* Dist. Ct. Dkt. No. 16-1, at 4; Dist. Ct. Dkt. No. 30-1; Dist. Ct. Dkt. No. 13-2, at 2.

Subsequently, Mr. Jackson made initial payments totaling $1,080 toward his Home Depot Citibank credit card balance and referred numerous potential customers to Home Depot/CWS. JA59; Dist. Ct. Dkt. No. 24-1, at 4-5. Though Mr. Jackson did receive at least one $100 check for a referral he made, at some point the Home Depot/CWS representative became unresponsive to Mr. Jackson's attempts to refer other potential customers. *Id.* at 4; JA28. Mr. Jackson unsuccessfully attempted to cancel the transaction and return the equipment to Home Depot/CWS, and stopped making payments toward the balance on the Home Depot-branded Citibank credit card. Dist. Ct. Dkt. No. 24-1, at 4.

B. State Court Proceedings.

Citibank brought a debt-collection suit against Mr. Jackson in North Carolina state court seeking to recover the balance on his Home Depot-branded Citibank credit card—the charge for the water-treatment system plus over four thousand dollars in

interest and fees, a total of more than $12,000. JA14; Compl. at 6, *Citibank v. Jackson*, No. 16-CVD-10961 (Dist. Ct. Div., Mecklenburg Cty., NC June 17, 2016).

Mr. Jackson answered the complaint, stated his affirmative defenses, and brought compulsory counterclaims against Citibank—claims he was *required* to bring as part of the *state*-court proceeding or else forfeit them. He also brought claims against Home Depot and CWS for their roles in the scheme creating the debt Citibank sought to collect—claims that he also needed to bring in the proceeding to avoid risking forfeiture. *See infra* 54-55; JA18-40. Among other things, Mr. Jackson contended that because the transaction with Home Depot and CWS that gave rise to the debt was null and void under the North Carolina Referral Sales statute, there was no valid debt on which Citibank could collect. JA20.

Mr. Jackson's third-party claims against Home Depot and CWS on behalf of a class of North Carolina victims of the water-treatment system scheme alleged that the companies violated North Carolina's Referral Sales statute and prohibition on unfair and deceptive trade practices. JA36-39. Mr. Jackson also brought an individual claim against Citibank, asserting all his claims against Home Depot and CWS against Citibank under North Carolina's holder rule. JA39-40.

Citibank responded by voluntarily dismissing its debt-collection claims against Mr. Jackson without prejudice—a fact that Home Depot leaned on heavily in its arguments for removal. JA41; *see* App. 8a-9a,

13a.[3] Because Citibank's dismissal is without prejudice, nothing precludes Citibank from reasserting its claims against Mr. Jackson. App. 13a.

Home Depot removed the case to federal district court. JA42.

C. District Court Proceedings.

Home Depot's notice of removal to federal court cited 28 U.S.C. § 1441 and the Class Action Fairness Act ("CAFA"). Home Depot contended that it was "a defendant who may properly remove the case under 28 U.S.C. §§ 1441 and 1453." JA45.

Shortly after removal to federal court, Home Depot filed a motion to realign the parties to have Mr. Jackson identified as the Plaintiff, and Home Depot, CWS, and Citibank identified as the Defendants. Mr. Jackson opposed the motion. *See* App. 17a-18a.

Mr. Jackson moved to remand the case to state court on three bases. First, under well-established precedent, additional counterdefendants like Home Depot may not remove a civil action. JA51-52; Dist. Ct. Dkt. No. 24, at 19-23.[4] Second, Home Depot failed to demonstrate that the case meets the $5 million jurisdictional threshold for class actions removed based on diversity: Based on the damages each class

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[3] The Appendix to the Petition for Certiorari is cited herein as App. Xa.

[4] Throughout this brief, Mr. Jackson uses the term "counterdefendant" to refer to any counterclaim defendant, and the term "additional counterdefendant" to denote counterdefendants who are not plaintiffs. The broader term "derivative defendants" includes additional counterdefendants and any other party joined to an existing case by a defendant.

member would be likely to claim, to meet the $5 million threshold, the class would have to be over 1500 North Carolina homeowners. *Id.* at 6-15. Home Depot has revealed that there are 286. Dist. Ct. Dkt. No. 36, at 16.

Finally, Mr. Jackson argued, the case meets the local-controversy exception to federal-court jurisdiction under CAFA. *See* 28 U.S.C. § 1332(d)(4)(A). First, since the class comprises persons in North Carolina who purchased home water-treatment systems, more than two-thirds of the class members are citizens of North Carolina. Second, one of the defendants—CWS—is a citizen of North Carolina, the class seeks significant relief from CWS, and CWS's actions form a significant basis for the claims. Third, the injuries occurred in North Carolina. Fourth, during the prior three years, no other class action asserting similar facts had been filed. Dist. Ct. Dkt. No. 24, at 15-19. Home Depot challenged each of these arguments.[5]

While the remand motion was being briefed, Citibank—still a party to the action—CWS, and Home Depot each filed its own motion to compel individual arbitration of Mr. Jackson's claims. Citibank moved to compel arbitration on the basis of the arbitration agreement in its card agreement. Dist.

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[5] Home Depot asserts that Mr. Jackson brought claims against Home Depot only because of its "deeper pockets." Dist. Ct. Dkt. No. 36, at 30. That ignores the ample evidence that Home Depot was an integral part of the scheme. Indeed, consumers had to sign a contract with Home Depot as part of the transaction, and Home Depot was making a 1,000% profit on the unneeded systems—it would have been illogical to leave Home Depot out. *See* JA31.

Ct. Dkt. No. 11. Rather than challenge the ability of Citibank to enforce its arbitration agreement, Mr. Jackson chose to amend his claims to eliminate allegations against Citibank. JA53-68. Mr. Jackson retains his rights to renew those claims.

CWS sought to compel individual arbitration of Mr. Jackson's claims against it on the basis of the arbitration clause in the CWS agreement. Dist. Ct. Dkt. No. 16; *see* Dist. Ct. Dkt. No. 16-1, at 5. Mr. Jackson opposed the motion. Dist. Ct. Dkt. No. 34.

The Home Depot agreement, on the other hand, contains no arbitration clause. But Home Depot argued that, even though Mr. Jackson had dropped his claims against Citibank, his claims about Home Depot's water-treatment system scam nevertheless "relat[ed] to" the Citibank account—and were therefore within the scope of the Citibank agreement—because Mr. Jackson used the Home Depot-branded Citibank account to finance the transaction. JA82.

Further, Home Depot argued, it could enforce the Citibank agreement as a nonsignatory because it was a third-party beneficiary of the agreement—that Home Depot was so "connected with Citibank" for purposes of the water-treatment sales scheme, Citibank intended to confer the benefits of its agreement on Home Depot. JA83. And Home Depot argued that for similar reasons of interconnectedness, it should be allowed to enforce the arbitration clause in the CWS agreement as well. JA85, 137. Mr. Jackson opposed Home Depot's motion. JA96-120.

The district court first addressed Mr. Jackson's motion to remand. App. 16a-23a. The district court quickly dispatched with Home Depot's argument that

it was a "defendant" entitled to remove, explaining that the Fourth Circuit, in *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008), had expressly held that "an additional counter defendant is not a 'defendant' for purposes of § 1441(a)"—a holding perfectly consistent with this Court's holding in *Shamrock Oil*. App. 19a (quoting *Palisades*, 552 F.3d at 333).

The district court also rejected Home Depot's contention that this Court's decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014) overruled *Palisades*. App. 19a-21a. The district court found persuasive the Seventh Circuit's reasoning to the contrary in *Tri-State Water*. App. 20a. Because *Dart Cherokee* evinced no intent to overrule *Shamrock Oil*, and *Palisades* was built on *Shamrock Oil* and its progeny, *Dart Cherokee* could not have overruled *Palisades*. App. 21a.

The district court granted Mr. Jackson's motion to remand without reaching the amount-in-controversy or local-controversy questions. App. 23a.

The district court then denied Home Depot's motion to realign the parties, explaining that the parties remained properly aligned on the "principal purpose" of the lawsuit—Citibank's debt collection action—and that there were no antagonistic parties on the same side. App. 22a. Further, it declined to "promote forum shopping" by "allowing realignment only to create federal jurisdiction." App. 22a.

The district court denied the motions to compel arbitration without prejudice to refiling in state court. App. 23a.

D. Decision of the Fourth Circuit.

Home Depot sought permission to appeal the remand order under 28 U.S.C. § 1453(c). The Fourth Circuit ordered briefing and oral argument, and granted permission in the order resolving the appeal. App. 2a. The Fourth Circuit unanimously affirmed the district court's decision to remand. App. 15a.

First, the Fourth Circuit rejected Home Depot's argument that *Dart Cherokee* undermined *Palisades*. *Dart Cherokee* held that no antiremoval presumption applied to cases removed under § 1441 pursuant to the jurisdiction granted by CAFA, and Home Depot contended that *Palisades*' holding that an additional counterdefendant was not a defendant for purposes of removal rested on such a presumption. App. 9a. Carefully parsing the language in *Palisades*, the Fourth Circuit disagreed, explaining that the conclusion in *Palisades* was based, not on a presumption against removal, but on the "well-established" meaning of "defendant" in the removal statutes. App. 10a-11a. "When Congress," the Fourth Circuit explained, "uses a term with a well-established meaning, we presume—absent evidence otherwise—that Congress intends to adopt that meaning, because Congress is presumed to be aware of judicial interpretations." App. 11a (citing *First Bank v. DJL Props., LLC*, 598 F.3d 915, 917 (7th Cir. 2010)). The appellate court expressed agreement with the Seventh Circuit's decision in *Tri-State Water* and declined to "upend so settled a definition as 'defendant.'" App. 11a.

Second, the Fourth Circuit rejected Home Depot's argument that *Palisades* was distinguishable because here, Citibank had dismissed its claims against Mr.

Jackson, and Mr. Jackson had dismissed his claims against Citibank. App. 12a. When Home Depot removed, Mr. Jackson's claims against Citibank remained live; Mr. Jackson's later dismissal of the claims could not retroactively justify Home Depot's removal. *Id.* Thus, the only question was whether Citibank's dismissal of its debt-collection claims against Mr. Jackson could permit Home Depot to remove—and the Fourth Circuit rejected that, too. The court explained that permitting Citibank's dismissal to allow Home Depot to remove would (1) be contrary to the court's longstanding interpretation of "defendant" in the removal statutes; (2) give Citibank, the original plaintiff, the power to determine whether counterclaims against it could be removed to federal court; and (3) invite gamesmanship between the original plaintiff and the third-party defendants to manipulate jurisdiction. App. 12a-13a.

The Fourth Circuit went on to affirm the district court's denial of Home Depot's motion to realign, explaining that realignment was not warranted where, as here, there was no "attempt to fraudulently manufacture diversity jurisdiction" by the party opposing realignment. App. 15a.

SUMMARY OF ARGUMENT

I. Jurisdiction is a balancing act. Within the boundaries provided by the Constitution, Congress regulates both original and removal jurisdiction to balance the interests of litigants, the states, and the federal government. With respect to removal, the balance Congress has most often struck limits removal authority to "defendants"—parties against whom a plaintiff files a complaint.

In *Shamrock Oil*, this Court paid close attention to the balance Congress had struck. It analyzed the text of the general removal statute then in effect and noted that, while the previous removal statute had allowed a broader class of parties to remove, the statute at issue narrowed that removal authority to "defendants." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 105-07 (1941). Based on this restriction, the Court held that the plaintiff in that case could not remove even though he was the counterdefendant to a counterclaim over which there was federal jurisdiction.

Paying similarly close attention to the balance Congress struck in the current general removal statute, 28 U.S.C. § 1441(a), requires the conclusion that counterdefendants may not remove civil actions based on counterclaims. The text of § 1441(a) expressly limits removal jurisdiction to actions over which federal courts have original jurisdiction—that is, where the *plaintiff* could have filed its complaint in federal court—and it expressly limits the parties who may remove to "defendants"—a word that is widely understood in this context to exclude counterdefendants.

In the 70 years that § 1441(a) has been the general removal statute, a consensus has emerged among federal courts and commentators that derivative defendants, including counterdefendants, are not "defendants" who may remove under that statute. In response to the lower courts' near-unanimous verdict that derivative defendants may not remove, Congress has taken no steps to amend the removal statutes to include them.

If Home Depot succeeds in persuading this Court to redefine § 1441(a) to permit removal by additional counterdefendants, the effects will be far-reaching and destabilizing. For one thing, the meaning of each instance of the common word "defendant" in the U.S. Code will suddenly become uncertain. For another, litigants will have a host of new opportunities to get ordinary state-law claims into federal court.

Most of the cases in which counterdefendants and other derivative defendants attempt to remove are individual cases, not class actions. Accepting Home Depot's position would likely lead to the federal courts being inundated with run-of-the-mill state-law cases for negligence or personal injury. If such a drastic revision of removal jurisdiction is nonetheless warranted, Congress and not this Court should be the one to make that change.

II. Nothing in CAFA requires a different rule for class actions.

CAFA is a creature of compromise, enacted after years of debate amongst members of Congress with sharply differing views. The eventually-enacted compromise expanded original jurisdiction over class actions and altered some of the procedures governing removal as applied to class actions. It did not change the meaning of the word "defendant"; nor did it eliminate the requirement that actions may only be removed if they fall within the original jurisdiction of the federal courts.

Contrary to Home Depot's contention, CAFA's allowance of removal "by any defendant without the consent of all defendants," 28 U.S.C. § 1453(b), does not change the meaning of "defendant." It changes, for class actions, the rule that all defendants must

consent to removal. Home Depot argues that the mere inclusion of the word "any" in this provision entirely upends the established meaning of the word "defendant"—and transforms the provision from a targeted relaxing of removal procedures into a dramatic expansion of removal jurisdiction. But there is no indication in the text or legislative history of CAFA suggesting any such dramatic expansion. Moreover, the phrase "any defendant" appears throughout the U.S. Code, where it is used interchangeably with other phrases like "a defendant" and "the defendant," and it is never used to refer to counterdefendants. To the contrary, when Congress wants to refer to counterdefendants, it does so expressly.

Furthermore, Home Depot doesn't even attempt to argue that CAFA eliminates § 1441(a)'s "original jurisdiction" requirement. Instead, Home Depot suggests that § 1441(a) simply doesn't apply to class actions at all. But that's not what CAFA says. The source of removal jurisdiction for class actions, like other civil actions, remains § 1441(a). CAFA merely changed some of the procedures that govern such removal.

III. Home Depot's policy arguments for radically changing the way removal jurisdiction has worked for nearly a century are meritless. Home Depot argues that if counterdefendants are unable to remove, wily plaintiffs with class claims will refrain from bringing those claims in federal court and just hope that they happen to be sued in state court, so they can bring their claims as counterclaims and avoid removal. That's absurd; and there's simply no evidence that it's happening—for all of their handwringing, Home

Depot and its *amici* have come up with strikingly few cases where class counterclaims could be removed if only the longstanding rule against counterclaim removal were changed.

Congress struck a careful balance in passing the removal statutes, and CAFA. If Home Depot thinks the balance should be different, it needs to ask Congress—not this Court.

IV. The Fourth Circuit's opinion should be affirmed for additional reasons unrelated to the questions presented. First, had the lower courts reached the issues instead of ruling that Home Depot lacked authority to remove, they would likely have remanded anyway either based on the so-called local controversy exception and the substantial connections between this case and Mr. Jackson's home state of North Carolina, or based on Home Depot's inability to prove it meets CAFA's amount-in-controversy requirement, or both. Second, the Fourth Circuit did not rule on Home Depot's petition for leave to appeal the district court's remand order within 60 days as required by 28 U.S.C. § 1453(c), in violation of a jurisdictional provision Congress "designed to promote expedition." *Dart Cherokee*, 135 S. Ct. at 556 n.6.

ARGUMENT

I. NOT PERMITTING DERIVATIVE DEFENDANTS TO REMOVE A CIVIL ACTION IS CONSISTENT WITH *SHAMROCK OIL*'S REASONING, WHILE HOME DEPOT'S APPROACH WOULD GREATLY EXPAND FEDERAL JURISDICTION.

Congress balances many factors when legislating the limits of federal jurisdiction: fairness to litigants; a desire for uniformity in the law; respect for state autonomy; and "relieving the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts in order to keep them free for their distinctive federal business." *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941). Ever since the first Congress passed the first jurisdictional statute, the Judiciary Act, in 1789, the balance Congress has struck with respect to removal has been, generally, to allow only "the defendant" to remove, but to extend the right of removal to other parties when fairness or other considerations warrant such an expansion. Sometimes, as during Reconstruction, concerns over fairness to out-of-state litigants led Congress to open the gates of federal courts as wide as Article III of the Constitution would allow. *See, e.g.*, Judiciary Act of 1875, ch. 137, 18 Stat. 470. But for most of this nation's history, up through today, Congress has chosen to limit the general removal statute to parties sued by plaintiffs—namely, "defendants."

Focusing on the words Congress used to delimit removal authority, and the context in which those words were chosen, this Court in *Shamrock Oil*

concluded that counterdefendants may not remove. Those same modes of analysis, applied to the general removal statute now codified at 28 U.S.C. § 1441(a), require the same conclusion. Indeed, the text of § 1441(a) makes clear that counterdefendants may not remove counterclaims, regardless of whether they are plaintiffs—as in *Shamrock Oil*—or third parties.

In the 70 years since its enactment, courts have consistently read § 1441(a) to apply only to defendants sued by plaintiffs and not to derivative defendants. Legal commentators like Wright and Miller and the members of the American Law Institute have joined this consensus view. And despite amending the general removal statute multiple times, most recently in 2011, Congress has never expanded § 1441(a) to permit removal of cases outside the federal courts' original jurisdiction or by parties other than "the defendant or defendants."

This Court should not step in where the branch of government charged with setting limits on federal-court jurisdiction has chosen not to tread.

A. *Shamrock Oil*'s Analysis Applies with Equal Force to Derivative Defendants.

In *Shamrock Oil*, this Court recognized that in determining the bounds of removal jurisdiction, Congress balances a host of competing considerations—and that when that balance shifts, Congress changes the language of the removal statutes. *Shamrock Oil* involved the general removal statute passed in 1887, which replaced the words "either party" in the previous statute with the phrase "the defendant or defendants." 313 U.S. at 104-05. With this change, the Court explained, Congress

intended "to narrow the federal jurisdiction on removal." *Id.* at 107.

The Court also found the context surrounding the 1887 legislation significant: Specifically, while Congress narrowed the general removal authority to "defendants," it retained a specific provision from the previous statute that allowed *any* out-of-state litigant, including a plaintiff, to remove if "he will not be able to obtain justice in [the] State court." *Id.* at 106-07 & n.2. This fine-tuning of removal authority convinced the Court that Congress had precise tools at its disposal for striking the balance it deemed appropriate.

This Court found it particularly important to defer to the balance Congress struck because jurisdiction raises considerations of federalism and comity: "Due regard for the rightful independence of state governments," this Court explained, "requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 108-09.

Home Depot suggests that the central concern of *Shamrock Oil* was "the rights of the plaintiff"—that this Court crafted a "rule" to ensure that plaintiffs get one, but not "two bites at the federal-election apple." Pet. Br. 17, 29. But *Shamrock Oil* did not craft the "rule" governing removal; Congress did. And under the rule Congress crafted, many plaintiffs don't get *any* bites at the federal-election apple. Like Citibank in this case, for example, many plaintiffs have no choice but to file suit in state court because their controversy is not one over which the federal district courts have original jurisdiction—and Congress

decided not to permit removal based on a defense or counterclaim.

Shamrock Oil held that the removal statute did not permit a plaintiff to remove based on a counterclaim, period. This Court did not distinguish between plaintiffs whose claims qualified for federal jurisdiction but chose to file in state court anyway (those who had one bite at the apple), and plaintiffs whose claims had to be filed in state court due to a lack of federal jurisdiction (those with no bites)—because Congress made no such distinction in the statute. *See Shamrock Oil*, 313 U.S. at 108 (no evidence that Congress "intended to save a right of removal to some plaintiffs and not to others").

Contrary to Home Depot's characterization, *Shamrock Oil* did not "focus[] on the rights of a plaintiff" or "the role of the plaintiff as distinct from the defendant," Pet. Br. 17. It focused on the text of the statute and the importance of preserving the balance between state and federal courts that Congress had struck.

Those same considerations counsel that counterdefendants—be they plaintiffs or third parties—may not remove under today's general removal statute, 28 U.S.C. § 1441(a). Allowing counterdefendants to remove claims pled against them by defendants, as Home Depot advocates, would thwart Congress' intent as reflected in the text of § 1441(a), is at odds with the broader context of removal statutes, and would upset the balance between federal and state courts.

B. The Text of § 1441(a) Does Not Authorize Additional Counterdefendants to Remove Civil Actions.

The current general removal provision—28 U.S.C. § 1441(a)—is the successor to the statute considered in *Shamrock Oil*. Enacted seven years after that decision, the provision remains unchanged to this day: "Except as expressly provided by act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants." Revised Judicial Code of 1948, Ch. 646, 62 Stat. 869. Like the *Shamrock Oil* statute, § 1441(a) makes clear that counterdefendants may not remove.

1. Section 1441(a) limits removal to cases in which federal courts "have *original* jurisdiction." 28 U.S.C. § 1441(a) (emphasis added). This Court has long held that the purpose of this limitation is to permit removal only where *the plaintiff's complaint* could have been filed in federal court. *See, e.g.*, *Mexican Nat'l R.R. Co. v. Davidson*, 157 U.S. 201, 208 (1895) (diversity jurisdiction); *State of Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 461-62 (1894) (federal question jurisdiction).

This "original jurisdiction" requirement, which Congress first added to the general removal statute in 1887, was a "radical" change; earlier jurisdictional statutes contained no such limitation. *Davidson*, 157 U.S. at 208. Before 1887, this Court had repeatedly held that removal could be based on the claims of "either party." *Planters' Bank*, 152 U.S. at 460. By changing the statute to "confin[e] the suits which

might be removed to those of which" federal courts are "given original jurisdiction," Congress essentially overruled those cases. *See Davidson*, 157 U.S. at 208. Since then, in case after case, this Court has reiterated that removal jurisdiction must be assessed solely based on *the plaintiff's* complaint—could the plaintiff have filed its complaint in federal court? *See, e.g., Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 10 & n.9 (1983); *Planters' Bank*, 152 U.S. at 464. Allegations made by the defendant—whether in an answer or a counterclaim—are irrelevant. *See Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009) ("[A] counterclaim . . . does not provide a key capable of opening a federal court's door."); *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 & n.2 (2002) (Scalia, J.) ("[A] counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for [federal] jurisdiction.").[6]

Section 1441(a) is the successor to the 1887 removal act. To this day, it still limits removal to cases within the "original jurisdiction" of the federal courts. Where Congress has wanted to make an exception to this rule and permit removal based on a defense or a counterclaim, it has said so. *See infra* 30-

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[6] The one very rare exception to this rule is "when a federal statute wholly displaces the state-law cause of action through complete pre-emption" because, in that case, the plaintiff's claim, "even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003).

31. In asking this Court to permit removal under § 1441(a) based on a defendant's counterclaim, Home Depot is effectively asking the Court to ignore the limits Congress imposed—to write the words "original jurisdiction" out of the statute. This Court should decline to do so.

2. Home Depot's contention that third parties may remove cases based on counterclaims not only violates § 1441(a)'s restrictions on *what* can be removed—only civil actions within federal courts' original jurisdiction—but it also violates the statute's restrictions on *who* can remove. Section 1441(a) limits removal authority to "the defendant or the defendants" to a "civil action." 28 U.S.C. § 1441(a). And the ordinary meaning of the word "defendant" in the removal context is a party sued in a plaintiff's complaint—it does not include a third party joined by the defendant.

Scores if not hundreds of cases dating back over fifty years all agree on this meaning of the word "defendant." *See, e.g.*, *White v. Baltic Conveyor Co.*, 209 F. Supp. 716, 719 (D.N.J. 1962) ("Sec. 1441(a) does not utilize the words 'third-party defendant,' but merely uses the word 'defendant.' To define the word defendant to mean not only the defendant in an original complaint but in addition a third-party defendant would be an unwarranted act of judicial legislation."); *Fiblenski v. Hirschback Motor Lines, Inc.*, 304 F. Supp. 283, 285 (E.D. Ark. 1969) ("[T]he reference in the general removal statute, § 1441, is only to plaintiff's defendants[.]" (quoting 1A Moore's Federal Practice (2d ed.) 263-64 n.8)); *Share v. Sears,*

Roebuck & Co., 550 F. Supp. 1107, 1108-09 (E.D. Pa. 1982) (same).

More recent cases have commented on the near-unanimity of this understanding. *E.g.*, *Mach v. Triple D Supply, LLC*, 773 F. Supp. 2d 1018, 1050-51 (D.N.M. 2011) ("courts have consistently interpreted" *Shamrock Oil* to preclude removal by derivative defendants, citing appellate and district court cases); *BJB Co. v. Comp Air Leroi*, 148 F. Supp. 2d 751, 752 (N.D. Tex. 2001) ("[D]istrict courts throughout the country have, in relative unison, determined that third-party defendants are not defendants within the meaning of § 1441(a)[.]" (collecting cases)); *Bank of New York Mellon v. Cioffi*, No. 15-13935, 2016 WL 3962818, at *7 (D. Mass. July 21, 2016) (surveying the caselaw and reporting that the "Court [has not] been able to locate any decision from any circuit permitting an additional counterclaim defendant to remove pursuant to § 1441(a)").

Treatises and commentators, too, consistently define "defendant" in the removal context the same way. *See* 16 Moore's Federal Practice § 107.11[1][b][iv], at 107-31 (Matthew Bender 3d ed. 2000) ("[T]hird-party defendants are not defendants within the meaning of the removal statute[.]"); 14C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3731 (3d ed. 1998) ("Nor can third-party defendants brought into the state action by the original defendant exercise the right of removal to the federal court[.]").

Home Depot argues that instead of using the well-established definition of "defendant" in the removal

context, this Court should define "defendant" in accordance with its use in the Federal Rules of Civil Procedure. But, contrary to Home Depot's assertion, the Federal Rules also use the word "defendant" to mean a party sued by the plaintiff; when the Rules apply to counterclaim or third-party defendants, they say so expressly. Rule 30, for instance, provides that absent a stipulation between the parties, a party must get leave of the court to take a deposition if it "would result in more than 10 depositions being taken . . . by the plaintiffs, or by the defendants, *or by the third-party defendants*." Fed. R. Civ. P. 30(a)(2)(A)(i) (emphasis added). If the word "defendants" automatically included third-party defendants, Rule 30 would not need to specify that the Rule counts depositions taken by both defendants *and* third-party defendants.

Home Depot repeatedly cites Rule 12 as demonstrating that the Rules use the word "defendant" to include counterdefendants, but that Rule contains separate provisions governing "a defendant," Fed. R. Civ. P. 12(a)(1)(A), and "a party" answering "a counterclaim or crossclaim," Fed. R. Civ. P. 12(a)(1)(B). Home Depot also relies on an Advisory Committee note to the 1966 amendments, which explains that "for the purpose of" applying the joinder rules to counterclaims and crossclaims, "the party pleading the claim is to be regarded as a plaintiff and the additional parties as plaintiffs or defendants as the case may be." Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment. But this note demonstrates that an unadorned reference to

defendants is *not* necessarily understood to include counterdefendants. If it were, counterclaim or crossclaim defendants would not need to be "*regarded as*" defendants for purposes of joinder—they would always already be understood as defendants.

Home Depot also cites *Black's Law Dictionary*, but *Black's*, too, distinguishes between defendants and third-party defendants. *Black's* does not list third-party defendants as a subcategory of defendants, but defines "third-party defendant" separately as its own term. *See Black's Law Dictionary* (10th ed. 2014) (Westlaw); *see also id.* at Guide to the Dictionary (explaining that Black's uses subentries to collect related terms).

3. Congress likewise uses the word defendant in accordance with how it has always been used in this context—a party sued by the plaintiff. Where Congress intends a statute to apply to counterdefendants, it says so expressly. Take, for example, the America Invents Act (AIA), enacted in 2011. There, Congress provided that with respect to certain patent actions, "parties that are accused infringers may be joined in one action as defendants *or counterclaim defendants*." 35 U.S.C. § 299 (emphasis added). In § 1441, on the other hand, which Congress also amended in 2011, Congress didn't allow "defendants or counterclaim defendants" to remove. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(A), 125 Stat. 758 (enacted Dec. 7, 2011). Section 1441(a) continues to limit removal to just "defendants." This is a distinction that makes a

difference, and § 1441(a) should be interpreted accordingly.

4. Home Depot's arguments to the contrary are meritless. First, Home Depot asserts that "[d]etermining whether a particular claim can form the basis of removal and who has the right to remove it should be made from the perspective of the claim itself." Pet. Br. 23. But that's not what the statute says. Section 1441(a) authorizes the removal of "any *civil action*," not any claim. 28 U.S.C. § 1441(a) (emphasis added). A "civil action" is an entire case; a claim is merely a demand for relief—perhaps one of many—made within the case. *See Black's Law Dictionary* (10th ed. 2014) (Westlaw) (defining "action" as a "judicial proceeding" and "claim" as "a demand for money, property, or a legal remedy to which one asserts a right"); *Carey v. Bank of Am., N.A.*, 904 F. Supp. 2d 617, 619 (N.D. Tex. 2012) (citing cases).

Where Congress has intended that removal be analyzed by claim, rather than the civil action as a whole, it has said so. Indeed, in contrast to § 1441(a), which authorizes removal of "any civil action" that falls within the district court's "original jurisdiction," § 1441(c) authorizes removal of civil actions if they "include[]" certain kinds of "claim[s]," 28 U.S.C. § 1441(c). This distinction between claims and civil actions occurs throughout the removal statutes, with some statutes—like § 1441(a)—authorizing removal only of entire civil actions, while others authorize removal on a claim-by-claim basis. *See infra* 30-31. This Court should reject Home Depot's contention

that § 1441(a) should be analyzed on a claim-by-claim basis, contrary to its text.

Second, Home Depot's argument that the word "defendant" must include any party that can possibly be given a label containing the word defendant is inconsistent with its own concession that counterdefendants who are also original plaintiffs cannot remove under § 1441(a). *See* Pet. Br. 2, 15, 20. To reach Home Depot's interpretation, one would have to assume not only that § 1441(a) deviates from the longstanding interpretation of the word "defendant," but also that the statute contains an unwritten limitation—that, despite authorizing removal by "the defendant or defendants," full stop, it should be read as if it authorized removal by "the defendant or defendants who are not also plaintiffs." In contrast, if "defendant" is interpreted as it has always been interpreted—as a party sued by the plaintiff—no additional words need be read into the statute.

Finally, Home Depot argues that "defendant" can't be limited to parties sued by the plaintiff because § 1446—which provides the procedures governing cases removed under § 1441(a)—expressly permits defendants added to a plaintiff's complaint after it was initially served to remove. *See* Pet. Br. 21. But a party whom the plaintiff adds to the complaint after it is initially filed is still a party sued by the plaintiff.

Indeed, § 1446 *supports* the argument that a "defendant" for purposes of § 1441(a) is limited to someone sued by the plaintiff. Section 1446(c)(1) provides that a case may not be removed on the basis

of diversity "more than 1 year after commencement of the action, unless the district court finds the plaintiff has acted in bad faith" to prevent removal. 28 U.S.C. § 1446(c)(1). If additional counterdefendants were permitted to remove based on counterclaims, it would make no sense for this provision to be limited to the plaintiff's bad faith. Presumably, if counterdefendants could remove, Congress would also have permitted removal after one year if the *defendant* who filed the counterclaim acted in bad faith to prevent removal of that claim.

C. The History and Statutory Context of § 1441(a) Further Support the Conclusion that Additional Counterdefendants Cannot Remove.

The history and statutory context of § 1441(a) further support the interpretation demonstrated by the statute's text: that the law is limited, authorizing removal only of civil actions that the plaintiff could have originally filed in district court and only by a party sued by the plaintiff.

As discussed above, the general removal statute—§ 1441(a) and its predecessors—have, with one aberration, always been narrowly limited to "defendants"; and since 1887, they have been further limited to cases that fall within the original jurisdiction of the federal courts. *See supra* 18-24.

In contrast, when Congress has wanted to authorize broader removal for certain categories of cases, it has passed specific statutes doing so explicitly. For example, the bankruptcy removal

statute provides that "*[a] party* may remove *any claim or cause of action* in a civil action . . . to the district court for the district where such civil action is pending, if such district court has *jurisdiction of such claim or cause of action* under section 1334 of this title." 28 U.S.C. § 1452(a) (emphasis added); *see* Thomas B. Bennett, *Removal, Remand, and Abstention Related to Bankruptcies: Yet Another Litigation Quagmire!*, 27 Cumb. L. Rev. 1037, 1053 (1997) (citing cases demonstrating that unlike § 1441(a), the bankruptcy removal statute permits derivative defendants to remove); *Lead I JV, LP v. N. Fork Bank*, 401 B.R. 571, 588 (E.D.N.Y. 2009) (explaining that the statute's reference to removal of a "claim or cause of action" indicates that some claims may be removed without others).

Similarly, Congress has authorized broad removal in patent litigation under the AIA, which provides that "*any party*" may remove "[a] civil action in which any party asserts a *claim for relief* arising under any Act of Congress relating to patents, plant variety protection, or copyrights." 28 U.S.C. § 1454(a) (emphasis added). The whole point of this provision (and similar provisions amending the statutes governing original and appellate jurisdiction over patent claims) was to override this Court's decision in *Holmes Group v. Vornado* that a patent counterclaim could not serve as the basis for federal jurisdiction. *See Vermont v. MPHJ Tech. Invs., LLC*, 803 F.3d 635, 644 (Fed. Cir. 2015).

The bankruptcy removal statute and the AIA demonstrate that when Congress wants to expand

removal jurisdiction to counterclaims or derivative defendants, it knows how to do so—and it does so using broad words much different from the limited language found in § 1441(a).

D. Congress Has Declined to Amend § 1441(a) to Permit Removal by Derivative Defendants.

The removal statutes are not obscure provisions hidden in a dusty corner of the U.S. Code to which Congress rarely pays attention. Congress has amended them more than ten times since 1965. Yet, while Congress repeatedly changed other provisions in § 1441, the language of § 1441(a) has remained untouched since 1948—even as court after court has joined the consensus that only defendants sued by a plaintiff may remove under this statute.

Where judicial opinions demonstrate that a removal statute has struck a different balance than Congress would prefer, it has changed the law. When Congress wanted to limit the basis for removal to the plaintiff's complaint, it added the "original jurisdiction" requirement. *See supra* 22-24. When it wanted to broaden removal jurisdiction for patent cases to encompass counterclaims after this Court's decision in *Holmes*, it passed the "*Holmes* fix"—the AIA. *See supra* 31. In the seventy-eight years since *Shamrock Oil*—in all the decades during which courts have interpreted the case (and, more generally, the text of § 1441(a)) to limit removal authority to defendants sued by plaintiffs—Congress has never implemented a "*Shamrock Oil* fix."

And that's not because Congress wasn't aware of this judicial consensus. In fact, Congress discussed a

proposal to amend the statute to permit counterdefendants to remove. *See Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary on S. 1876*, 92nd Cong. 14 (1971) (proposed § 1304(c) would have provided that "[a] counterclaim asserted in a state court shall be deemed an action for purposes of this section"); *id.* at 80 (noting that this provision "changes existing law by treating a plaintiff defending a counterclaim in a state court or a third party impleaded on such a counterclaim as a defendant for purposes of removal"). If Congress agreed with Home Depot that *Shamrock Oil* was broken, it knew how to fix it. It just chose not to.[7]

In *Shamrock Oil*, this Court honored Congress' choice to limit removal jurisdiction to defendants even if it meant that some plaintiffs who could not file in federal court originally would not get the chance to remove there either. *See Shamrock Oil*, 313 U.S. at 108. Congress has since repeatedly chosen to retain the limitations on removal in § 1441(a). This Court should honor that choice. If Home Depot and its *amici* believe such a result is unfair, they should bring those concerns to Congress.

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[7] While in the 1970s the American Law Institute suggested amending the removal statutes to allow counterdefendants to remove, later the A.L.I. position evolved. And in its more recent statements, it has recommended against such a move. A.L.I., Federal Judicial Code Revision Project 325, 351 (2004).

E. Accepting Home Depot's Position Would Lead to Absurd Results.

Reinterpreting § 1441(a) to drastically broaden removal jurisdiction beyond what its text allows would have troubling consequences. For one thing, adopting Home Depot's position would "make hash" not just of the removal statutes, but of the entire U.S. Code. *See First Bank*, 598 F.3d at 917 (Easterbrook, J.). The word "defendant" appears in 490 federal statutes, excluding Title 18, the criminal provisions. To rule that Congress, without any indication in the text of § 1441(a), intended to expand "defendant" to include counterdefendants begs the question of whether "defendant" has a similarly expansive meaning in all other statutes in which the term appears. Not only would such a radical reinterpretation of the word "defendant" spawn satellite litigation, but it would disturb the reliance interests of Congress and all those who seek to follow its laws, for "it is vital to maintain consistent usage in order to ensure that Members of Congress (and those who advise them) know what proposed language will do, and people can understand the meaning of statutes." *Id.*

Furthermore, accepting Home Depot's invitation to drastically expand removal jurisdiction under § 1441(a) would allow a huge number of individual, state-law cases into federal court. After all, Home Depot's proposed expansion isn't limited to class action counterdefendants, or even counterdefendants at all—Home Depot asks this Court to expand removal authority to "[a]ny party brought into the state-court forum involuntarily." Pet. Br. 21. This would include any counterdefendant, any third-party

defendant, any insurance company or product manufacturer or alleged co-tortfeasor that a defendant thought to implead.

Indeed, the judicial consensus that derivative defendants may not remove long predates CAFA and arose primarily through individual cases where a defendant sought removal after impleading a third-party defendant from another state. And while there have been few instances of class actions that would be removed if only Home Depot's view of § 1441(a) were the law, *see infra* 55-56, there are many examples of individual product liability or personal injury cases that would have ended up in federal court because a defendant sought indemnification from an insurer, product manufacturer or other third party located in another state—third parties who, under Home Depot's view, would all be "defendants" entitled to remove. *See, e.g., White*, 209 F. Supp. at 717 (insurance carrier should cover negligence claim); *Fiblenski*, 304 F. Supp. at 284 (one of two drivers in car crash impleaded tire manufacturer); *Share*, 550 F. Supp. at 1108 (merchant's third-party claim against manufacturer of allegedly defective lawn mower). This cannot be what Congress intended.

Moreover, changing the meaning of the word "defendant" and allowing counterclaims or third-party claims to become the basis for removal in derogation of the "original jurisdiction" rule would make it much easier to manipulate federal jurisdiction. Defendants in low-value state-law cases who preferred to litigate in federal court could do so just by pleading a barely-nonfrivolous counterclaim or third-party claim over which there would be federal jurisdiction. *See Lewis v. Windsor Door Co.*, 926 F.2d

729, 732 (8th Cir. 1991) (in personal injury action involving defective door on military base, door manufacturer's third-party claim against United States for indemnification could not create diversity jurisdiction because "[a]ny other rule would encourage parties to make improvident removals and then attempt to cure them by impleading a party that supplied jurisdiction").

If any rebalancing of interests needs to be done between federalism and consistency on the one hand, and fairness to derivative defendants on the other, Congress and not this Court is charged with striking that balance. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation" that would "give the district courts power the Congress has denied them." *Am. Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951). Congress has ascribed a consistent meaning to the word "defendant" in removal statutes for 230 years. Home Depot's position would not only rewrite long-established law about what the word "defendant" means, it would also require this Court to step into Congress' shoes.

II. CAFA DID NOT CHANGE THE LONGSTANDING RULE THAT COUNTER-DEFENDANTS CANNOT REMOVE COUNTERCLAIMS.

In enacting CAFA, Congress made a series of limited changes to federal-court jurisdiction over class actions in response to specific concerns. One thing CAFA—and its use of the word "any"—did *not* do was change the long-established meaning of the word "defendant." Nor did CAFA alter the general rule that

civil actions may not be removed based on a counterclaim.

A. "Any," Standing Alone, Does Not Upend the Meaning of "Defendant" for Purposes of Removal.

The use of the word "any" in front of "defendant" in 28 U.S.C. § 1453(b) does not alter the longstanding rule that only defendants sued by the plaintiff may remove cases to federal court. The last clause of § 1453(b) provides that certain actions "may be removed by any defendant without the consent of all defendants." Home Depot argues that, by using the word "any" in front of "defendant," § 1453(b) oh-so-subtly undid the settled understanding, discussed above, that only defendants sued by the plaintiff may remove cases to federal court.

But the clause merely removes the requirement that all defendants consent to removal where a case is subject to CAFA jurisdiction. 28 U.S.C. § 1453(b). Indeed, the Chamber of Commerce and its co-*amici* agree that the purpose and effect of this clause is to loosen the consent requirement. Chamber Br. 19. Notably, the Chamber Brief does *not* embrace Home Depot's argument that "any defendant" should be given a more expansive meaning.

There is no indication in the text of CAFA that Congress intended, solely through use of the word "any," to upend the settled understanding that the only "defendants" who may remove are those sued by plaintiffs. As this Court has repeatedly pointed out, Congress does not "alter . . . fundamental details . . . in vague terms"; it does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). "Had Congress intended to alter

this fundamental detail . . . we would expect the text of the amended [statute] to say so." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1947 (2016); *see also E.P.A. v. EME Homer City Generation, L.P.*, 572 U.S. 489, 528 (2014) (Scalia, J., dissenting) ("It would be extraordinary for Congress, by the use of the single word 'significantly,' to transmogrify a statute[.]").

Home Depot's argument to the contrary ignores that this Court has always looked beyond the word "any" in determining the scope of a statute; the Court looks to the statute as a whole to ensure that "the statutory scheme is coherent and consistent." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008); *see also Small v. United States*, 544 U.S. 385, 388 (2005) ("The word 'any' considered alone cannot answer" the question "whether the statutory reference 'convicted in *any* court' includes a conviction entered in a foreign court"). For example, while "any person" is "broad enough to comprehend every human being," in a certain statute, it referred only to persons over which the state had jurisdiction. *United States v. Palmer*, 16 U.S. 610, 631 (1818) (Marshall, C.J.).

"[G]eneral words," such as the word "any," must "be limited" in their application "to those objects to which the legislature intended to apply them." *Id.* Here, Congress passed CAFA against the backdrop of a well-established meaning of the word "defendant" in the removal context. It gave no indication that by ensuring that *any* defendant could remove without the consent of *every* defendant, it intended to change the longstanding meaning of the word defendant.

B. Congress' Specific Objectives in Passing CAFA Did Not Include Allowing Removal of Class Counterclaims.

1. The history of CAFA's passage confirms that Congress did not intend to undo the well-established understanding that only defendants may remove actions to federal court. Congress passed CAFA to accomplish three broad purposes: "(1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(b)(1)-(3), 119 Stat. 4. With three competing objectives, CAFA was a balancing act.

There's no doubt, to accomplish these objectives, Congress expanded federal jurisdiction over certain class actions. But, notwithstanding the cherrypicking by Home Depot and its *amici* of comments in the legislative debate that criticized state courts (ignoring the comments in support of state court class actions), Congress did not pass a statute simply stating that "federal courts will have jurisdiction over all class actions, without limit." Instead, Congress enacted a "narrowly-tailored expansion of federal diversity jurisdiction" and "modest amendments to current removal provisions that will make it harder for counsel to 'game the system.'" S. Rep. No. 109-14, at 27 (2005).[8]

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[8] The Senate report was published ten days after CAFA was signed into law, but it accords with the legislative discussions

The Senate report explains that by the "gaming problem," Congress meant two very specific issues with the pre-existing jurisdictional statutes in the context of class actions: (1) the "complete diversity requirement" for removal that allowed plaintiffs to prevent removal simply by joining a single local defendant; and (2) the "amount-in-controversy requirement" that did not permit the aggregation of claims, meaning that some class actions that, all together, involved large amounts of money, did not fall within federal court jurisdiction because no individual plaintiff's claim was more than $75,000. *Id.* at 10. To address these issues, § 4 of CAFA amends 28 U.S.C. § 1332 to grant federal courts original jurisdiction over "interstate class action cases where (a) any member of the proposed class is a citizen of a different state from any defendant; and (b) the amount in controversy exceeds $5 million (aggregating claims of all purported class members, exclusive of interest and costs)." *Id.* at 28.

But federalism demands a balancing act. And in this case, so did our political system. After six years of failed attempts to push the bill through Congress, compromises were made. The compromise bill that emerged in 2004 (and was eventually passed in 2005) "leaves in state court a wide range of class actions" and is "quite discriminating about which class actions will be removed to Federal court." 150 Cong. Rec. S7710 (daily ed. July 7, 2004) (statement of Sen. Dodd). The bill "rests on a delicate bipartisan

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predating the bill's passage. *See* 150 Cong. Rec. S7567-7710 (daily ed. July 6-7, 2004). And much of what's in the report appeared in House reports for prior versions of the bill. *See, e.g.*, H.R. Rep. 108-144 (2003).

compromise." 150 Cong. Rec. S7565 (daily ed. July 6, 2004) (statement of Sen. Hatch).

As part of the compromise, the Judiciary Committee added a number of provisions to limit CAFA's expansion of federal jurisdiction, including the home state and local controversy exceptions. Under the home state exception, class actions will remain in state court if "two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed." 28 U.S.C. § 1332(d)(4)(B). And under the local controversy exception, class actions with a truly local focus, determined by four specific criteria, also remain in state court. 28 U.S.C. § 1332(d)(4)(A).

Throughout the process of settling on CAFA's jurisdictional provisions, Congress did not once—in the statute, in the Senate report, or in seven years of draft bills and congressional hearings—consider changing the "longstanding, near-canonical rule" that a party to a counterclaim is without authority to remove. *Palisades*, 552 F.3d at 334 n.4. In fact, CAFA's provisions expanding federal courts' original jurisdiction repeatedly use the phrase "plaintiff classes," expressly excluding class counterclaims. *See, e.g.*, 28 U.S.C. § 1332(d)(2). This contrasts sharply with statutes like the AIA, discussed *supra*, that were passed with the specific intent to extend federal jurisdiction to cover counterclaims.

2. To complement the expansion of federal jurisdiction, CAFA's § 5 "establishes the procedures for removal of interstate class actions over which the federal court is granted original jurisdiction in new section 1332(d)." S. Rep. No. 109-14, at 48. In its

discussion of § 5, the Senate report clarifies that the general removal provisions already in Title 28, *see* 28 U.S.C. § 1441, *et seq.*, "would continue to apply to class actions, except where they are inconsistent" with CAFA's provisions. S. Rep. No. 109-14, at 48. For example, Congress explained that applying § 1441(b)'s complete diversity requirement "would perpetuate the current 'complete diversity' rule for class actions that new section 1332(d) rejects," and therefore is inconsistent, but that the venue provision of § 1441(a) would remain applicable. *Id.* at 48-49.

To reconcile the expanded federal jurisdiction in § 1332(d) with the requirements governing removal, § 5 amended several of the usual removal procedures. Thus, §§ 4 and 5 of CAFA, together, "create three new rules regarding the removal of class actions filed in state court." *Id.* at 29.

> First, any defendant would be able to remove a class action to federal court without the consent of any other defendant. Second, any defendant would be able to remove a class action to federal court, even if that defendant is a citizen of the state in which the action was brought. And third, the current ban on removal of a class action to federal court after one year would be eliminated.

Id.; *see also* 28 U.S.C. § 1453(b) (codification of three new rules).

The Committee explained its intent with regard to the rule permitting removal without the consent of all defendants as follows: "By this provision, it is the Committee's intent to overrule caselaw developed by the federal courts requiring the consent of all parties." S. Rep. No. 109-14, at 49. There is *no* indication

Congress meant this clause to overturn the understanding that only defendants to the original plaintiff's claims may remove.

This Court should be respectful of the significance of Congress' silence in the face of the long-standing and well-established line of cases holding that counterdefendants are not "defendants" for the purposes of removal jurisdiction. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979). That is especially true here, where the statute "evidences detailed appreciation of the background legal context" and Congress took care "to reverse *certain* established principles but not others." *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). If Congress wanted to overrule *Shamrock Oil*, it easily could have done so by writing "any defendant or counterclaim defendant" as it did in the AIA or "a party" as it did in the statute governing bankruptcy removal. *See supra* 30-31. But instead, Congress used the term "defendant"—a term with a well-settled meaning.

Congress' intent to leave the ordinary meaning of "defendant" in place is further confirmed by prior, failed attempts to expand removal powers under § 1453. In the proposed Class Action Fairness Act of 2003 (and prior versions), § 1453 allowed removal "by any plaintiff class member who is not a named or representative class member without the consent of all members of such class." S. 1751, 108th Cong. § 5(a) (Oct. 17, 2003). In the 2003 House report, Congress argued "only the named plaintiffs and their counsel have control over the choice of forum" and unnamed

class members should have "the same flexibility to choose the forum" as the named plaintiffs. H.R. Rep. 108-144, at 42 (2003). The provision was deleted in the Judiciary Committee as part of a series of compromises. *See* 150 Cong. Rec. S7569 (daily ed. July 6, 2004) (statement of Sen. Grassley).

This legislative history tells us that Congress contemplated granting removal powers to additional parties but chose not to do so. This rejected proposal also undermines Home Depot's contention that a principled distinction can be made between additional counterdefendants and counterdefendants who are also original plaintiffs. Home Depot argues the latter party "did not select the state-court forum." Pet. Br. at 37. But that's also true of unnamed class members. If Congress wanted every interested party to have a say in the forum, then it wouldn't have deleted the provision granting class members removal power.

Finally, Home Depot claims the term "any defendant" under § 1453 must include counterdefendants because any other interpretation undermines Congress' goal of stopping class action lawyers from gaming the system to avoid federal court. Pet. Br. at 41-43. But Congress' "gaming" concern was specific and doesn't have anything to do with whether counterdefendants may remove: Congress thought defendants must be able to remove without the consent of other defendants "to prevent a plaintiffs' attorney from recruiting a 'friendly' defendant (*e.g.*, a local retailer) who could refuse to join in a removal to federal court." S. Rep. No. 109-14, at 49 (2005); *see also* H.R. Rep. 108-144, at 43 (2003).

3. In short, nothing in CAFA suggests Congress intended to change the well-established law that only

defendants may remove. And what *is* in the legislative history suggests that silence was no mistake. CAFA is the product of seven years of contentious debate and legislative compromises. While CAFA expands federal jurisdiction in certain respects, CAFA only made it through Congress because that expansion was narrowly tailored to remove three specific procedural barriers to removal of interstate class actions—none of which involve counterdefendants. Home Depot may wish that Congress had not made these compromises in passing CAFA and instead passed a simple statute saying "there is federal jurisdiction over all class actions, and any party may remove such cases to federal court," but that was not the statute Congress passed.

C. The Use of "Any Defendant" in Other Statutes Does Not Encompass Parties Added to Civil Actions by Counterclaims.

CAFA is not the only statute stating that an action "may be removed by any defendant." In none of those statutes did Congress intend for "any defendant" to refer to counterdefendants. On the contrary, when Congress sought to permit removal by parties other than defendants sued by the original plaintiffs, it said so, and it said so clearly. When Congress uses the same phrase multiple times, Congress is assumed to have intended the same result. Home Depot's argument that CAFA meant to include counterdefendants in "any defendant" would (1) require reading "any defendant" in CAFA differently than in other statutes; or (2) dramatically change the meaning of a host of other statutes. Neither is an acceptable result.

In 2010 (post-CAFA), Congress enacted the SPEECH Act, which sought to eliminate enforceability of foreign judgments against journalists in American courts unless those judgments were consistent with the U.S. Constitution. Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), Pub. L. No. 111-223, 124 Stat. 2380 (2010). In an effort to expand federal-court jurisdiction over such enforcement actions, Congress used the exact same language it used in CAFA to require only minimal, rather than complete diversity for federal-court jurisdiction. *Compare* 28 U.S.C. § 4103 (SPEECH Act), *with* 28 U.S.C. § 1332(d)(2) (CAFA). The SPEECH Act then provides that the action "may be removed by any defendant . . . without regard to the amount in controversy between the parties." 28 U.S.C. § 4103. There is no indication that § 4103's final clause was intended to do anything other than exactly what it says: eliminate the amount-in-controversy requirement—just as there's no indication that § 1453(b) was intended to do anything other than loosen the consent requirement.

Because both the SPEECH Act's and CAFA's minimal diversity provisions are the same, and both use "any defendant," if Home Depot's argument is accepted, the same language would either have to mean two different things, or both would also have to include derivative defendants. The latter would set the stage for cases where all the plaintiffs and defendants are citizens of the same state, but parties are able to manufacture minimal diversity by bringing barely non-frivolous claims against out-of-state third parties. Nothing indicates Congress was interested in such a result in either statute.

In contrast, where Congress does intend to expand removal authority to parties beyond defendants, it does not do so in such a mousehole as "any." For example, in the AIA—enacted just one year after the SPEECH Act—Congress specifically provided that patent actions "may be removed by any party." 28 U.S.C. § 1454(b)(1) (emphasis added). And, as discussed above, the language of the AIA as a whole evinces congressional intent to address patent claims, not just against defendants, but also against counterdefendants. *See supra* 31; 35 U.S.C. § 299 (addressing "counterclaim defendants"); *MPHJ Tech.*, 803 F.3d at 643 (discussing impact and intent of AIA). In CAFA and the SPEECH Act, on the other hand, there are no indications that Congress meant to expand removal beyond defendants.

Furthermore, at the same time it enacted § 1441—in which "defendant" is universally understood to exclude counterdefendants, *see supra* Part I.B.2—Congress also enacted § 1448, which provides that when a case is removed to federal court before "any one or more of the defendants" has been served, that service of process may be completed, and the section "shall not deprive any defendant" of the right to move to remand. 28 U.S.C. § 1448. Again, nothing indicates that "any" is intended to give "defendant" a different meaning than it has in § 1441, but rather ensures all the defendants' rights are preserved. Every court to have considered whether § 1448 includes third-party defendants has rejected that argument, explaining that, regardless of the word "any," third-party defendants may not move to remand under § 1448. *See Foltz v. Columbia Casualty Co.*, No. 15-1144, 2016 WL 3829144, at *1-*2 (W.D. Okla. July 12, 2016) (defendant and third-party defendant designate

different parties); *H&H Terminals LC v. Ramos Family Tr., LLP*, 634 F. Supp. 2d 770, 776-77 (W.D. Tex. 2009) (same).

Similarly, "defendant" in the general federal venue statute refers only to defendants, not derivative defendants—even though it uses the phrase "any defendant." 28 U.S.C. § 1391(b)(1), (3); 6 Wright, et al., Federal Practice and Procedure § 1445 (3d ed.) ("[T]he statutory venue limitations have no application to Rule 14 claims even if they would require the third-party action to be heard in another district had it been brought as an independent action.").

Finally, as a general matter, Congress frequently uses "any defendant" interchangeably with "a defendant" or "the defendant" within the very same statute—Congress does not use the word "any" with the intent to meaningfully change the scope of "defendant." *See, e.g.*, 15 U.S.C. § 16(a), (g), (h) (using "a defendant," "the defendant," and "any defendant" interchangeably to refer to a/the/any defendant against whom a judgment or consent decree in an antitrust case has been entered); 15 U.S.C. § 78u-4(a)(8), (b)(1), (b)(2)(A), (b)(3)(A), (d), (f)(8)(C) (using "a defendant," "the defendant," and "any defendant" interchangeably to refer to a/the/any defendant against whom a securities action is brought); 42 U.S.C. § 1997e(c), (d), (g) (using "a defendant," "the defendant," and "any defendant" interchangeably to refer to a/the/any defendant against whom prisoner litigation is brought).

Thus, even outside of CAFA, there's no indication that Congress uses "any" instead of "a" or "the" to meaningfully expand what it means by "defendant."

"Any" on its own cannot bear the heavy weight of Home Depot's argument that Congress intended it to alter decades of settled law.

D. CAFA Did Not Alter the Rule that Only Civil Actions that Fall Within the Federal Courts' Original Jurisdiction May Be Removed.

Even if—contrary to its text, legislative history, and statutory context—§ 1453(b) could be read to have silently changed the longstanding rule that counterdefendants are not "defendants" who can remove, there is nothing in § 1453(b) that overrides the limitation on removal to cases within a federal court's "original jurisdiction." There is nothing, therefore, that permits removal based on a counterclaim or defense.

As explained above, CAFA did not create an entirely new, separate removal regime to govern class actions. Under CAFA, class actions continue to be governed by the "general removal provisions"—that is, they continue to be removed pursuant to the general removal statute, § 1441(a), in accordance with the general removal procedures, § 1446. S. Rep. 109-14, at 48. What CAFA did—via § 1453(b)—is make a few surgical changes to the procedures that ordinarily govern removal to address unique problems in the class action context. *See id.*; *supra* Part II.B.[9]

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[9] This makes perfect sense. Congress didn't need to create a new removal regime because § 1441(a), already provides for removal of civil actions over which federal courts have original jurisdiction. Thus, by expanding original jurisdiction over class actions in § 1332(d), CAFA automatically achieved a

The "original jurisdiction" rule is not one of these changes. Nothing in CAFA purports to eliminate § 1441(a)'s "original jurisdiction" requirement—the requirement that actions may only be removed if the *plaintiff's* claims could have been filed in federal court, that defenses and counterclaims are irrelevant. Home Depot does not even attempt to argue otherwise.[10]

Instead, Home Depot suggests that § 1441(a) doesn't apply to class actions at all; that class actions may be removed directly under CAFA's § 1453(b). *See* Pet. Br. 32. But that reading is not only inconsistent with the text and legislative history of § 1453(b); it would call the provision's constitutionality into question.

Section 1453(b) governs the *procedures* that apply to the removal of class actions: It states that "[a] class action may be removed to a district court of the United States in accordance with section 1446"—the general statute governing removal procedures—and then provides specific exceptions to those procedures. But Home Depot seeks to read this statute as providing removal *jurisdiction*: as independently authorizing the removal of class actions, rather than simply providing the procedures that govern class actions removed under the general removal statute § 1441(a).

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corresponding expansion in the class actions that could be removed from state court under § 1441(a).

[10] Nor does anything in CAFA change the requirement under § 1441(a) that civil actions get removed in their entirety, not claim-by-claim (or, as Home Depot would have it, counterclaim-by-counterclaim). *See supra* 28-29.

Home Depot's reading would render the statute unconstitutional. By its terms, § 1453(b) applies to *all* class actions. If it were read as an independent source of removal jurisdiction, therefore, it would authorize removal of literally any class action. But the Constitution limits the federal judicial power to certain kinds of cases—primarily those arising under federal law or between citizens of different states. *See* U.S. Const. art. III; *Gunn v. Minton*, 568 U.S. 251, 256 (2013) ("Federal courts are courts of limited jurisdiction," possessing "only that power authorized by [the] Constitution."). Not all class actions are cases over which federal courts may constitutionally exercise jurisdiction. If § 1453(b) is read to extend removal jurisdiction to *every* class action—including those, for example, between citizens of a single state under state law—it would violate the Constitution's limits on the federal judicial power. *See, e.g., Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 584 (2005) (absent other ground for jurisdiction, Constitution requires "minimal diversity").

It makes much more sense—and avoids constitutional problems—to read § 1453(b) as limited to setting forth the procedure for class actions removed under § 1441(a), rather than as providing independent removal jurisdiction. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (explaining that "[w]hen deciding which of two plausible statutory constructions to adopt," the Court should adopt the construction that does not raise constitutional problems, "whether or not those constitutional problems pertain to the particular litigant before the Court").

In passing CAFA, Congress made clear that this was its intent. Congress did not enact § 1453(b) to authorize removal of *all* class actions. After all, CAFA only grants original jurisdiction where class actions have minimal diversity and over $5 million in controversy; it would have been bizarre if Congress then granted removal jurisdiction over *all* class actions. Rather, it passed § 1453(b) to "establish[ ] the *procedures* for removal of interstate class actions *over which the federal court is granted original jurisdiction* in" CAFA—in other words, the procedures governing class actions removed under § 1441(a). S. Rep. 109-14 at 48 (emphasis added).

And that is exactly what the text of § 1453(b) accomplishes: While § 1453(b) establishes procedures for removal—those provided by § 1446, with limited exceptions—it lacks key information that would be necessary if it were the source of removal jurisdiction. As noted above, § 1453(b) does not identify which subset of class actions within the constitutional limits of the federal judicial power—for example, those over which CAFA grants original jurisdiction—may be removed. *Compare, e.g.*, 28 U.S.C. § 1452(a) (specifying that statute applies only to cases over which the district court has jurisdiction under the bankruptcy statute). Nor does it identify the venue to which cases should be removed. *Compare, e.g.*, 28 U.S.C. § 1441(a) (providing for removal "to the district court of the United States for the district and division embracing the place where such action is pending"); 28 U.S.C. § 1454(a) (same). Construed as a source of removal authority, § 1453(b) authorizes removal of an amorphous, unconstitutionally broad set of cases to an undefined court.

But construed, as Congress intended, as a procedural statute that governs removal of class actions under § 1441(a), § 1453(b) makes perfect sense: § 1441(a) already provides that removal is limited to civil actions over which federal courts have original jurisdiction, and that cases are removed to the district court "embracing the place where" they are "pending." A procedural statute governing the removal of class actions under § 1441 need not restate these limitations; it need only establish procedures. *Cf.* S. Rep. 109-14 at 48 (explaining that class actions—like all other actions removed under § 1441(a)—are subject to § 1441(a)'s venue provision). That's precisely what § 1453(b) does.

CAFA did nothing to alter the basic structure of removal: The source of removal authority for class actions—like other civil actions—continues to be § 1441(a). And under § 1441(a), only a "civil action" within the "original jurisdiction" of the federal courts can be removed. Counterclaims cannot.

III. THE POLICY ARGUMENTS OF HOME DEPOT AND ITS *AMICI* ARE MERITLESS.

The most frequent brick tossed at Mr. Jackson by Home Depot and its *amici* is to allege that Mr. Jackson was forum shopping with the goal of undermining CAFA—completely ignoring that one of the three companies engaged in this coordinated scam chose the forum where Mr. Jackson had no choice but to raise all of his claims. Home Depot suggests that it's just an unwitting bystander to the claim Citibank filed against Mr. Jackson, and accuses Mr. Jackson of using an unrelated lawsuit to bring a counterclaim against it as a "tactic" to avoid CAFA. Pet. Br. 44-45. But Home Depot is hardly a bystander. Citibank,

Home Depot, and CWS were closely interconnected in the water-treatment scheme to defraud Mr. Jackson and other consumers. *See supra* 2-5. The wildly overpriced water-treatment systems sold through deceptive statements and an illegal referral system would be outside of the average homeowner's ability to pay, but for a Home Depot-branded Citibank credit card, with a credit limit that exactly matches the cost of the system. *See supra* 4. Citibank is part of the package deal offered to consumers by Home Depot and CWS, and the prospect of Citibank suing individuals in state court—and those consumers counterclaiming against all members of the scheme—is an entirely foreseeable consequence of the scam.[11]

Given the intertwined roles of the three parties, once Citibank sued Mr. Jackson in state court, the only way to pursue his own claims under North Carolina state law against Citibank was through a counterclaim. And once he filed counterclaims against Citibank, Mr. Jackson had to bring his claims against Home Depot and CWS in the same case, or risk forfeiting them. Put another way, under North Carolina law, his claims against all three parties to the scheme were compulsory. *See Brooks v. Rogers*, 346 S.E.2d 677, 681 (N.C. App. 1986) (claims are related—and therefore compulsory—where they involve "substantially the same evidence" and "there is a logical relationship between" them). Given that

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[11] In defense to Citibank's collection action, Mr. Jackson argued that the debt is null and void because the Home Depot/CWS scheme violates the North Carolina Referral Sales statute. As such, even if Mr. Jackson had not brought any counterclaims, it's likely the state court would have had to opine on the legality of the Home Depot/CWS scheme to resolve Citibank's debt-collection claims. *Supra* 7.

these claims are compulsorily related, there is no basis to the allegations of forum shopping or misbehavior by Mr. Jackson. Far from being a tactic to evade federal court, bringing Home Depot and CWS into this action was the appropriate step for Mr. Jackson to protect his rights under North Carolina law.

Home Depot argues that allowing the Fourth Circuit's opinion in this case to stand will create "a giant loophole," through which a "very substantial proportion of class actions" could be diverted from federal to state court. Pet. Br. 42. Given that all four of the Courts of Appeals to consider this question since CAFA passed in 2005 have agreed with the decision below, one would have expected a large number of cases to be filed fulfilling these dire prophecies. No such flood of cases has manifested. In fact, Home Depot only cites one (another case involving an analogous water-treatment scam). Pet. Br. 45. Home Depot warns of a "tip of an approaching iceberg," *id.* at 44 (citation omitted), but the reality seems to be more of an ice cube.

The Chamber of Commerce, similarly, claims to identify a number of cases showing a "counterclaim end-run around CAFA," Chamber Br. 22, but the handful of cases it cites largely do not support this claim. *E.g.*, *Wells Fargo Fin. S.C., Inc. v. Mack*, No. 18-1479, 2018 WL 3687978 (D.S.C. July 13, 2018) (no class counterclaim in state court; case remanded because pro se defendants failed to comply with the federal rules); *Hart v. Knockerball MidMo, LLC*, No. 18-cv-04147, 2018 WL 4997650 (W.D. Mo. Oct. 15, 2018) (also not a class action; third-party defendants

alleged federal question, not diversity, jurisdiction, and court rejected that claim).

On the other hand, if this Court were to grant Home Depot's request to expand § 1441(a) to allow derivative defendants to remove, that *would* likely lead to many more cases coming into federal court. But they wouldn't be class actions: They would be a large number of individual cases, posing purely issues of state law. *See supra* Part I.E.

Finally, Home Depot argues that the application of the *Shamrock Oil* rule to counterdefendants is counter to the intent of CAFA. Pet. Br. 41-46. This argument stems from an absolutist view of CAFA, in which all state courts are always wrong to hear any class action. If Congress held this view, it could have expanded federal jurisdiction over class actions to the extent of its constitutional powers. But it chose not to do so. While Congress expanded federal diversity jurisdiction over class actions in a number of ways, the final legislation was a compromise. *See supra* Part II.B. Earlier versions would have created federal jurisdiction over more cases than did the final version. *See id.* The Chamber colorfully describes CAFA as the product of a "grinding eight-year effort." Chamber Br. at 14. The Chamber may have preferred a quick victory in which the parties seeking to federalize as many cases as possible had won every battle, but that is not what happened. This Court should not expand federal jurisdiction in additional ways not included in the actual legislation that passed.

IV. THIS COURT SHOULD AFFIRM THE DECISION BELOW ON THREE ADDITIONAL GROUNDS.

There are three additional reasons why this Court should affirm the decision below. Indeed, these grounds for affirmance are sufficient to permit this Court to affirm the decision below without even having to wade into questions about whether it should overrule decades of precedent that has spawned scores of cases and involves an intricate web of jurisdictional statutes.

First, even if, in general, counterdefendants may remove class counterclaims, CAFA specifically exempts local controversies from federal-court jurisdiction. *See* 28 U.S.C. § 1332(d)(4)(A). This case is exactly the kind of local controversy Congress exempted. Second, Home Depot failed to demonstrate that Mr. Jackson's counterclaims satisfy the amount in controversy required for CAFA jurisdiction. And, finally, CAFA requires that any appeal of a remand order be decided within sixty days or denied. *See* 28 U.S.C. § 1453(c)(2). The appeal here was not decided within sixty days. The Court of Appeals, therefore, was required to deny it.

A. Even if counterdefendants could remove civil actions, the district court here was required to decline jurisdiction under CAFA's local controversy exception. That exception states that a court "shall decline to exercise jurisdiction" over a class action where four criteria are met: (1) "greater than two-thirds of the members of all proposed plaintiff classes . . . are citizens of the State in which the action was originally filed"; (2) "at least" one defendant "from whom significant relief is sought" and "whose alleged

conduct forms a significant basis for the claims" is "a citizen of the State in which the action was originally filed"; (3) "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed"; and (4) "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A).

This case meets each of these criteria. First, the class Mr. Jackson seeks to represent is people who purchased water-treatment systems from Home Depot and CWS in the state of North Carolina. JA62. Home Depot's own records show that out of 286 North Carolina purchasers, 259 have North Carolina addresses. Dist. Ct. Dkt. No. 42-1, at 5-15. In other words, approximately ninety percent of the proposed class—far more than the two-thirds required by the local controversy exception—are citizens of North Carolina. *Id.* Second, "at least" one defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims"—CWS—is a citizen of North Carolina. Dist. Ct. Dkt. No. 24, at 16-17. Third, it's undisputed that the principal injuries of the alleged North Carolina water-treatment scheme occurred in North Carolina. *Id.* at 18-19. And, finally, no other class action asserting similar factual allegations against Home Depot or CWS was filed in the three years preceding Mr. Jackson's counterclaims. *Id.* at 19.

This is the quintessential local dispute: claims under North Carolina law brought by a North

Carolina class against at least one North Carolina defendant for conduct that occurred entirely in North Carolina. CAFA mandates that federal courts decline jurisdiction over this kind of dispute. Therefore, even if counterdefendants could remove civil actions, Home Depot could not remove this one. This Court, therefore, may affirm the decision below on this ground alone.

B. Furthermore, Home Depot failed to demonstrate that the case meets the $5 million jurisdictional threshold for class actions removed based on diversity. *See supra* 8-9. Based on the damages each class member would be likely to claim, to meet the $5 million threshold, there would have to be over 1500 class members. *Id.* There are 286. *Id.*

C. Finally, although—unlike ordinary remand orders—orders remanding a class action may be appealed, CAFA mandates that if a Court of Appeals does not "complete all action" on an appeal within "60 days after the date on which such appeal was filed," the appeal "shall be denied." 28 U.S.C. § 1453(c). The reason for this limitation is to ensure the opportunity for a body of appellate law to develop interpreting CAFA "without unduly delaying the litigation of class actions." S. Rep. 109-14, at 49; *see Dart Cherokee*, 135 S. Ct. at 556 n.6 (explaining that the reason for this provision is "to promote expedition").

Here, Home Depot filed its appeal of the district court's remand order on March 31, 2017, and the Fourth Circuit did not render judgment until January 22, 2018—far more than sixty days after the appeal was filed. App. 1a. Therefore, under CAFA, the Court of Appeals was required to deny the appeal. This too provides an alternative ground for affirmance.

CONCLUSION

The judgment for the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTRODUCTION

Home Depot removed a class action within federal courts' original jurisdiction. Home Depot is the defendant in the class action, and Jackson is the plaintiff. Congress authorized a "defendant" to remove an action that contains a claim that could have been filed in federal court. A third-party counterclaim defendant is a defendant; it should therefore be entitled to remove when the other requirements for removal are satisfied. This Court carved out a narrow exception to the plain meaning of "defendant" in the general removal statute when it held in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), that a counterclaim defendant that is *also* an original plaintiff does not qualify as a defendant for removal purposes. But none of the Court's reasons for making that exception—and no other reason—would support extending it to third-party counterclaim defendants. This Court should hold that a third-party counterclaim defendant is a defendant for removal purposes.[1]

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[1] Because of the phrasing of the Court's added question, "third-party counterclaim defendant" is used in this brief to refer to a party brought into a case as a new defendant to a claim asserted as or in conjunction with a counterclaim. As noted in the opening brief (at 16 n.*), however, that designation does not map onto the use of "third-party defendant" in Federal Rule of Civil Procedure 14. Moreover, the claims at issue in this case are not "counterclaims" because they are not asserted against the original (or any) plaintiff. JA36-JA40.

ARGUMENT

I. *Shamrock Oil* Should Not Be Extended To Third-Party Counterclaim Defendants.

Congress specified in the clearest possible terms that a "defendant" can remove when an action filed against it falls within federal courts' original jurisdiction. 28 U.S.C. § 1441(a).[2] The questions in this case boil down to whether a third-party counterclaim defendant is a defendant—and that question answers itself. A third-party counterclaim defendant is a defendant, not a plaintiff.

A. Nothing in *Shamrock Oil* Supports Extending Its Rule to Third-Party Counterclaim Defendants.

This case, like *Shamrock Oil*, presents a statutory-interpretation question. Both cases require this Court to interpret the same word (defendant) in nearly identical versions of the same statute (the general removal provision). In *Shamrock Oil*, the Court held that an original plaintiff is not a "defendant" under the general removal provision, even when defending a counterclaim. 313 U.S. at 104-109. The Court had no occasion to consider whether a counterclaim defendant that is *not* also a plaintiff can remove. But none of the reasoning in *Shamrock Oil*—and no other reason—supports extending *Shamrock Oil* to third-party counterclaim defendants.

1. In statutory interpretation, analysis should begin (and end, if possible) with the statute's text.

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[2] For ease of reference, relevant provisions of Title 28 are reproduced in a statutory appendix to this brief.

Section 1441(a) authorizes removal by "the defendant or the defendants." A third-party counterclaim defendant *is* a defendant. A third-party counterclaim defendant is not a plaintiff; it is only a defendant to the new claim filed against it. When a counterclaim is a claim that could have been filed in federal court based on diversity jurisdiction, an original defendant to *that* claim can remove under Section 1441(a).

Because nothing in Section 1441(a) purports to define "defendant," that term should be given its ordinary meaning. A defendant is "[a] person sued in a civil proceeding." *Black's Law Dictionary* 508 (10th ed. 2014). A third-party counterclaim defendant is a person sued in a civil proceeding—and is therefore a defendant. Jackson's argument depends on his assertion (at, *e.g.*, i) that "plaintiff" is limited to the party that initiates a lawsuit and "defendant" is limited to the party "against whom the plaintiff has brought claims." It is true that a plaintiff "brings a civil suit in a court of law." *Black's*, *supra*, at 1336. But nothing in that definition or in its ordinary use throughout the U.S. Code suggests that each civil case can have only one plaintiff or only one *type* of plaintiff. The terms "plaintiff" and "defendant" are umbrella terms, encompassing various sub-categories. *See id.* at 508, 1336 (listing several types of plaintiff and defendant in definitions). Jackson contends (at 18) that "defendants" encompasses only "parties sued by plaintiffs." But that is precisely what a third-party counterclaim defendant is—a party sued by a counterclaim plaintiff. Nothing in Section 1441(a) suggests that "defendant" does not include third-party counterclaim defendants. From

Home Depot's perspective, it is a defendant and only a defendant.[3]

2. In *Shamrock Oil*, this Court created an exception to the ordinary meaning of "defendant" in Section 1441(a)'s predecessor. The Court held—based on the history and purposes of the general removal provision—that a counterclaim defendant that is *also* an original plaintiff cannot remove. But none of the reasons that supported that carve-out support its extension to third-party counterclaim defendants.

First, in *Shamrock Oil*, the Court relied on the evolution of the statutory text, explaining that, since Congress first authorized removal in the Judiciary Act of 1789, ch. 20, 1 Stat. 73, Congress generally limited removal authority to defendants. *Shamrock Oil*, 313 U.S. at 104-107. The Court noted only two exceptions to that practice: the 1875 act, which authorized removal by "either one or more of the plaintiffs or defendants," Removal of Causes Act, ch. 137, § 2, 18 Stat. 470, 471 (1875), and the 1867 act, which authorized removal by "plaintiff or defendant" upon a showing of local prejudice, Act of Mar. 2, 1867, ch. 196, 14 Stat. 558, 559. When Congress again restricted removal authority to "the defendant or defendants" in 1887, the Court explained, it intended to withdraw *from plaintiffs* the authority to remove. 313 U.S. at 107-108.

The evolution of the statutory text that is now Section 1441(a) *supports*, rather than condemns, the conclusion that a third-party counterclaim defendant can

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[3] In this case, Home Depot was not able to remove the class action pursuant to Section 1441(a) because, *inter alia*, Home Depot's co-defendant Carolina Water Systems is a North Carolina citizen. *See* 28 U.S.C. § 1441(b)(2).

remove a qualifying case. Throughout the history of removal provisions, Congress conceived of parties in binary categories: plaintiffs and defendants. In most removal provisions, Congress specified that defendants alone can remove. When Congress expanded removal authority, it specified that "either party," "plaintiffs or defendants," may remove. § 2, 18 Stat. at 471; *see* 14 Stat. 558. That drafting history strongly suggests that Congress viewed *all* parties as plaintiffs or defendants, not that Congress intended "plaintiff" and "defendant" to describe only the original parties to the case. Jackson does not contest that any counterclaim defendant could have removed under the 1875 removal provision, which authorized removal by "plaintiffs or defendants"—and *Shamrock Oil* seemed to accept that as a given. *See* 313 U.S. at 106-107. But that correct premise requires accepting that a third-party counterclaim defendant is either a plaintiff or a defendant. It is not a plaintiff, so it must be a defendant—and nothing in the post-1875 removal provisions suggests that Congress intended to narrow the definition of "defendant" when it withdrew from plaintiffs the power of removal.

Second, *Shamrock Oil* is premised on the counterclaim defendant's status as a *plaintiff* in that case, not its status as a counterclaim defendant. Although in the removal context, Congress conceives of litigants as plaintiffs or defendants, some litigants are both. The question before the Court in *Shamrock Oil* was whether to treat an original plaintiff that was also a counterclaim defendant as a plaintiff or as a defendant for removal purposes. Notably, the Court nowhere suggested that the original plaintiff could not remove because its status as counterclaim defendant meant

that it was not a real defendant. Instead, the Court explained that the counterclaim defendant could not remove because it was also the *plaintiff*, and nothing in the drafting history or in the statute itself suggested that Congress intended to "sav[e] the right of a plaintiff, in any case or to any extent, to remove the cause upon the filing of a counterclaim." 313 U.S. at 107. Holding otherwise, the Court explained, would have required "sav[ing] a right of removal to some plaintiffs and not to others," and the Court could find "no basis" for doing so. *Id.* at 108.

None of those concerns applies with respect to a third-party counterclaim defendant. Such a defendant is not a plaintiff; it is only a defendant. Allowing a third-party counterclaim defendant to remove by giving "defendants" its ordinary meaning does not contravene Congress's intent to withdraw from plaintiffs the right to remove or require distinctions among plaintiffs.

Finally, *Shamrock Oil* explained that a plaintiff invoking state-court jurisdiction should not be permitted to remove when it becomes a defendant to a counterclaim because Congress had expressed its view that it is "just and proper to require the plaintiff to abide his selection of a forum." 313 U.S. at 106 n.2 (quoting H.R. Rep. No. 49-1078, at 1 (1886)). That concern reflected in part a desire to give "[d]ue regard for the rightful independence of state governments." *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)). The Court also relied on its earlier holding in *West v. Aurora City*, 73 U.S. (6 Wall.) 139 (1868), which interpreted the materially identical removal provision in the Judiciary Act of 1789 to exclude removal by a plaintiff subject to a counterclaim. The Court explain-

ed that *West* held that "the plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Shamrock Oil*, 313 U.S. at 106.

That concern also does not support extending the exception to third-party counterclaim defendants. A third-party counterclaim defendant does not voluntarily invoke state-court jurisdiction; he is "a defendant who has not submitted himself to th[at] jurisdiction." *Shamrock Oil*, 313 U.S. at 106. As explained in the opening brief (at 24-32), the history of diversity jurisdiction and removal authority illustrate that both are designed to protect an out-of-state litigant's right to have a cause against him heard in federal court. Jackson simply ignores that history, falling back repeatedly on his flawed premise that "defendant" encompasses only a party sued by an original plaintiff—a phrase that appears nowhere in Section 1441(a).

B. Jackson Identifies No Valid Reason to Extend *Shamrock Oil* to Third-Party Counterclaim Defendants.

Jackson offers a menu of reasons to extend *Shamrock Oil* to third-party counterclaim defendants. The Court should reject them all.

1. Jackson argues (at 24-31) that, if Congress intended to include third-party defendants when it authorized removal by "defendants," it would have said so specifically. But that is not how we interpret plain statutory text. This Court has explained that when Congress uses a broad phrase to describe the category of entities covered by a statute, there is no reason for it to specify each subcategory within the broader class.

Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 220 (2008). Here, Congress specified that "defendants" can remove a qualifying action. "We have no reason to demand that Congress write less economically and more repetitiously," *id.* at 221, by specifying every *type* of defendant that can remove when it already provides that they all can (at least when they are not also a plaintiff, per *Shamrock Oil*). It is well accepted, for example, that a defendant-intervenor can remove. 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3730 (4th ed.). Defendant-intervenors are usually denoted as such on dockets, pleadings, and orders. But that particular designation does not remove them from the umbrella term "defendants" in Section 1441(a).

Jackson points to one statutory provision and one rule that separately refer to "defendants" and "third-party defendants." Jackson notes that Federal Rule of Civil Procedure 30 limits the number of depositions that may be taken "by the plaintiffs, or by the defendants, or by the third-party defendants," Fed. R. Civ. P. 30(a)(2)(A)(i), and contends (at 26) that the separate designation of defendants and third-party defendants signals that "defendants" does not "automatically include[] third-party defendants." That is wrong. The Rules Committee referred separately to "defendants" and "third-party defendants" in Rule 30 because it wanted to treat them as separate entities for purposes of limiting depositions. Original defendants and third-party defendants are often not aligned, so it makes sense to give each type of defendants a separate allotment of depositions. Under Jackson's logic, if the Rules Committee had designated ten depositions for plaintiffs and ten for "defendants," third-party defen-

dants would be entitled to *none*. That cannot be right. The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011)—which authorizes the joinder of parties accused of patent infringement as "defendants or counterclaim defendants," 35 U.S.C. § 299 (cited at Resp. Br. 27)—also provides no help. Congress's choice to be more specific in unrelated statutes does not suggest that "defendants," standing alone, should not have its ordinary meaning in the context of removal where Congress treats parties as either plaintiffs or defendants.

More generally, there is no merit to Jackson's suggestion that, when Congress specifies special treatment for a subcategory of defendants in some provisions, it intends to *exclude* them from references to "defendants" in all other Code and rule provisions. Congress routinely provides for special treatment of a subclass within an umbrella term without restricting the meaning of the umbrella term in other provisions. The term "corporation," for example, designates a legal status that encompasses a number of different types of corporations. *See Black's*, *supra*, at 415-419. In some U.S. Code provisions, Congress refers to specific types of corporations—for example, when establishing special taxation rules applicable to S-corporations. 26 U.S.C. §§ 1361-1379. But by singling out S-corporations for special tax treatment in those provisions, Congress did not thereby *exclude* S-corporations from the general declaration in 26 U.S.C. § 11 that "[a] tax is hereby imposed for each taxable year on the taxable income of every corporation." An S-corporation is a type of corporation, just like a third-party counterclaim defendant is a type of defendant. Congress afforded special treatment to S-corporations in limited

circumstances—but when Congress elsewhere imposes rules on "corporations," those rules apply to S-corporations. The same is true here: very occasionally, counterclaim or third-party defendants receive special treatment. But that does not suggest that counterclaim or third-party defendants are not included when Congress uses the umbrella term "defendant."

Jackson also asserts that accepting Home Depot's view would "have troubling consequences" and "lead to absurd results." Resp. Br. 34 (capitalization altered). Jackson notes that "defendant" appears in at least 490 federal statutes (civil and criminal) and suggests that chaos will reign if "defendant" is understood to include many defendant types, including third-party counterclaim defendants. Curiously, Jackson fails to identify *even one* of those 490 provisions that would be rendered senseless or be expanded beyond what Congress intended if the Court were to adopt Home Depot's view. And, under Jackson's view, third-party defendants would have no responsive pleading obligation under Federal Rule of Civil Procedure 12(a)(1), which refers to "defendant[s]," but does not mention third-party defendants. The Court should reject Jackson's hyperbole.

2. Jackson's other textual arguments are equally flawed.

Determining whether a particular claim can form the basis of removal and who has the right to remove it should be made from the perspective of the claim. Jackson attempts to refute that commonsense proposition by noting (at 28) that Section 1441(a) authorizes removal of a "civil action," not of particular claims. That is true as far as it goes—but it does not go far.

When a claim within a civil action could have been filed in a federal court, the entire "civil action" is removable, including most claims that fall within federal courts' supplemental jurisdiction. *See* 28 U.S.C. § 1441(c). But it is plain on the face of Section 1441 that whether a civil action is removable can be determined only by examining whether the underlying *claims* are within federal courts' original jurisdiction. When a claim is removable, only the defendant *to that claim* can remove. This Court has already explained that whether a "civil action" is removable based on diversity jurisdiction must be determined by examining whether one or more claims in the action satisfies the requirements of 28 U.S.C. § 1332. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 562-564 (2005); *see City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 166 (1997) (holding same in federal-question context).

This Court has held that when a defendant brings a counterclaim, he "institute[s] a cause of action" and "invoke[s] the jurisdiction" of the court in which it was filed. *Tex. & Pac. Ry. Co. v. Eastin*, 214 U.S. 153, 159 (1909); *see Freeman v. Bee Mach. Co.*, 319 U.S. 448, 453 (1943). And when that happens, "the defendant bec[o]me[s] a plaintiff." *Merch. Heat & Light Co. v. J.B. Clow & Sons*, 204 U.S. 286, 289 (1907). When an original defendant asserts a counterclaim against a third party, the original defendant therefore initiates an action in which it is the plaintiff and the third-party is the defendant.

3. Jackson also misunderstands Section 1441(a)'s requirement that a removable civil action must be within federal courts' "original jurisdiction." Jackson insists (at 22) that a civil action satisfies that require-

ment "only where *the plaintiff's complaint* could have been filed in federal court." That view has no basis in Section 1441(a)'s text. *See Carl Heck Eng'rs, Inc. v. Lafourche Par. Police Jury*, 622 F.2d 133, 136 (5th Cir. 1980) ("[T]he language of [then-operative Section 1441(c)] does not require only those causes of action joined by the original plaintiff to form the basis of removal."). "[O]riginal jurisdiction" in this context is not limited to state-court cases that could have been filed in federal court *as originally filed* in state court. If, for example, a state-court plaintiff amends her complaint by dismissing claims against a non-essential in-state defendant, thereby creating complete diversity where none existed before, the action would become one within federal courts' original jurisdiction and subject to removal—even though it was not removable as originally filed. That is apparent from Section 1446, which provides that when a case that is "not removable" based on "the initial pleading" later "become[s] removable," it can be removed. 28 U.S.C. § 1446(b)(3); *see* 28 U.S.C. § 1332(d)(7). In this case, the action "bec[a]me removable" (under 28 U.S.C. § 1453(b)) when Jackson filed his counterclaim and class-action complaint, which asserts claims within federal courts' original jurisdiction.

Jackson's assertion (at 34) that Home Depot's view "would allow a huge number of individual[] state-law cases into federal court" is mystifying. The only cases that would be allowed into federal courts are the cases that include claims that could have been filed in federal court. Home Depot's view would not expand federal courts' jurisdiction beyond that already established by Congress.

Jackson further errs in relying (at 22-23) on rules that govern the removability of cases within federal-question jurisdiction under 28 U.S.C. § 1331. This Court has held that whether an action falls within federal-question jurisdiction depends only on the plaintiff's well-pleaded complaint, without reference to the defendants' defenses. *See, e.g.*, *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 9-11 (1983). That rule does not apply where removability depends on district courts' diversity jurisdiction under 28 U.S.C. § 1332, which assumes that the relevant claims *do not* arise under federal law. Jackson errs in relying on two decisions stating that a counterclaim cannot form the basis of removal under federal-question jurisdiction. Resp. Br. 23 (citing *Vaden v. Discover Bank*, 556 U.S. 49, 66 (2009); *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830-831 & n.2 (2002)). Neither decision involved removal and neither involved a new claim asserted against a new defendant. In each case, this Court in effect applied *Shamrock Oil*'s rule to hold that "arising under" jurisdiction could not be premised on a counterclaim asserted against the original plaintiff. *Vaden*, 556 U.S. at 54-55, 61-62; *Holmes Grp.*, 535 U.S. at 828, 832. But in each case, the Court was careful to note that the holdings were limited to federal-question jurisdiction—which was not at issue in *Shamrock Oil* and is not at issue here.

The purpose of the well-pleaded-complaint rule and related rules governing federal-question jurisdiction does not support adopting Jackson's view. The well-pleaded-complaint rule protects a plaintiff's right "to have the cause [of action] heard in state court" "by eschewing claims based on federal law." *Holmes Grp.*,

535 U.S. at 831 (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987)). The opposite is true of diversity jurisdiction—diversity jurisdiction is intended to protect an out-of-state *defendant's* right to choose a federal forum when sued in state court. Allowing diversity-based removal when an original defendant asserts a qualifying claim against a new defendant respects the intent of the Framers and early Congresses. Pet. Br. 24-32.

4. Jackson also relies on what Congress has *not* done, arguing (at 32-33) that Congress's failure to amend Section 1441(a) in the face of a "consensus" among lower courts that "defendant" does not include third-party counterclaim defendants should be viewed as congressional ratification of that position. Jackson is mistaken in both his premise and his proposed conclusion.

Lower courts have *not* uniformly held that a third-party counterclaim defendant is not a "defendant" under Section 1441. Although most courts have (mis)interpreted *Shamrock Oil*'s original-plaintiff rule as an original-defendant rule, some have permitted removal by third-party counterclaim defendants. The Fifth Circuit held that, under an earlier version of Section 1441(c), a third-party counterclaim defendant could remove a counterclaim that was sufficiently distinct from the original plaintiff's claims. *Texas ex rel. Bd. of Regents v. Walker*, 142 F.3d 813, 816 (5th Cir. 1998); *Carl Heck Eng'rs*, 622 F.2d at 135. The Eleventh Circuit also permitted removal in such circumstances. *United Benefit Life Ins. Co. v. U.S. Life Ins. Co.*, 36 F.3d 1063, 1064 n.1 (11th Cir. 1994). Lower courts have noted that courts "are hopelessly divided on whether and under what circumstances a third party

defendant may remove." *Cent. of Ga. Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935, 937 (5th Cir. 1970); *Soper v. Kahn*, 568 F. Supp. 398, 400 (D. Md. 1983).

Even if lower courts had reached consensus, that would not support Jackson's reliance on congressional inaction. This Court has held that "'[c]ongressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)) (brackets in original), specifically rejecting arguments that congressional inaction should be viewed as approval of an existing judicial gloss on statutory text. The Court has explained that "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible," noting that "[t]his Court has many times reconsidered statutory constructions that have been passively abided by Congress." *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969). As Justice Thomas has explained, "it is inappropriate to give weight to 'Congress' unenacted opinion' when construing judge-made doctrines, because doing so allows the Court to create law and then 'effectively codif[y]' it 'based only on Congress' failure to address it.'" *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 299 (2014) (Thomas, J., concurring in the judgment) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 827 (2014) (Thomas, J., dissenting)) (brackets in original).

II. Home Depot Was Entitled To Remove This Action Under CAFA.

If the Court agrees that a third-party counterclaim defendant is a "defendant" under Section 1441(a), it follows *a fortiori* that a third-party counterclaim defendant can remove under the broader language in 28 U.S.C. § 1453(b). The posture of this case makes the point starkly. With the exception of Jackson (the representative party bringing the class action), *every* member of the purported class is a plaintiff and nothing else; Home Depot is a defendant and nothing else. Yet, Jackson's entire argument is premised on the notions that his co-class members are not plaintiffs and that Home Depot is not a defendant—premises that blink reality. Indeed, the class action is not a "counterclaim" as to Home Depot, which has never asserted claims against Jackson, the original defendant.

A. The Text, Structure, and Purpose of CAFA Confirm That a Third-Party Counterclaim Defendant Can Remove.

1. Section 1453(b), enacted as part of the Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4, provides that "any defendant" may remove a qualifying "class action." Jackson asserted his class action by joining it with a counterclaim in state court[4]—but it is still a "class action" within the meaning of Section 1453(b). Jackson's complaint confirms

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[4] Although irrelevant to the outcome here, Home Depot's opening brief erroneously stated (at 8) that Citibank was also a defendant to the class action.

that he is asserting "a consumer class action," that he is the "Third-Party Plaintiff," and that Home Depot is a "Third-Party Defendant[]." JA22.[6] Because the plain meaning of "defendant" includes third-party counterclaim defendants, Home Depot was entitled to remove under Section 1453(b).

2. "Defendant" should have its ordinary broad meaning across removal statutes, encompassing all types of defendants (original defendants, defendant-intervenors, third-party counterclaim defendants, etc.), at least when they are not also plaintiffs. But if the Court instead holds that "the defendant or the defendants" has a specialized (atextual) meaning in Section 1441(a), it should still hold that "any defendant" in Section 1453(b) includes third-party counterclaim defendants.

a. In enacting CAFA, Congress significantly broadened removal for class actions. First, Congress expanded the types of class actions falling within federal courts' original diversity jurisdiction. 28 U.S.C. § 1332(d)(1)(B). Second, for those class actions, Congress removed the rule that an action must be removed within one year. 28 U.S.C. § 1453(b). Third, Congress eliminated the requirement (which was then a judicial

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[6] Although state-law designations do not control whether a party can remove, North Carolina law views Home Depot as a plain-vanilla defendant to Jackson's counterclaim. North Carolina Rule of Civil Procedure 13(h) provides that, "[w]hen the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or crossclaim, the court shall order them to be brought in *as defendants*[.]" N.C. Gen. Stat. § 1A-1, Rule 13(h) (emphasis added); *see also* Fed. R. Civ. P. 13(h) advisory committee's note to 1966 amendment.

gloss, *see Chi., Rock Island & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247-248 (1900), and is now codified at 28 U.S.C. § 1446(b)(2)(A)) that a defendant may not remove an action without the consent of its co-defendants. 28 U.S.C. § 1453(b). Fourth, Congress removed the restriction that an in-state defendant may not remove. *Ibid.* Finally, Congress specified that "any defendant" can remove a qualifying class action.

This Court has explained that "any" "has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Because a third-party counterclaim defendant is a defendant of whatever kind, it qualifies as "any defendant" under Section 1453(b). Far from being a "mousehole[]," Resp. Br. 37 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)), "any" is a capacious word that encompasses elephant defendants and mouse defendants alike.

Jackson supports his atextual reading by pointing to other instances in which Congress uses "any defendant," arguing (at 46-47) that nothing in those provisions indicates that "any defendant" includes third-party counterclaim defendants. But that is not how we do statutory interpretation—the question is whether anything in those statutes suggests that "any defendant" should *exclude* a type of defendant. And the answer is no. Jackson's reliance (at 31-32, 47) on statutes that authorize removal by "any party" is equally unavailing. There is no reason to think that, by using a different phrase in unrelated removal provisions, Congress intended "any defendant" in Section 1453(b) to have an atextual meaning. Moreover, both of the statutes Jackson relies on govern subject matter

areas (patent and bankruptcy law) over which federal courts have exclusive jurisdiction. Congress's use of an even more capacious term in that context does not counsel in favor of an artificially narrow reading of "any defendant" in CAFA.

b. Jackson also argues (at 44) that Congress's change from "the" to "any" did not expand the class of defendants entitled to remove because it instead eliminated the requirement that all defendants must agree to removal. That is wrong because Congress did that directly with the addition of "without the consent of all defendants." 28 U.S.C. § 1453(b). But even if the addition of "any" helped to effect that change, Jackson's contention that that is all it did is wrong. This Court interpreted "the defendant" in the predecessors to Section 1441(a) to mean *both* that a counterclaim defendant could not remove when also a plaintiff *and* that a defendant could not remove without the consent of co-defendants. *Shamrock Oil*, 313 U.S. at 104-109; *Chi., Rock Island & Pac. Ry. Co.*, 178 U.S. at 247-248. Jackson argues that by changing "the" to "any," Congress overturned the unanimity requirement (which at the time of CAFA's enactment had not yet been codified), but offers no reason to believe that it did not *also* overturn *Shamrock Oil*'s restrictive reading of who may remove. *See Palisades Collections LLC v. Shorts*, 552 F.3d 327, 339-340 (4th Cir. 2008) (Niemeyer, J., dissenting).

c. Jackson also argues (at 50-53) that a plain-text reading of Section 1453(b) "would authorize removal of literally any class action." He contends that Section 1453(b) cannot be viewed as providing a basis for removal that is independent from Section 1441(a) because "[b]y its terms, § 1453(b) applies to *all* class

actions." Resp. Br. 51. That argument is puzzling—because Section 1453 expressly *does not* apply to all class actions. Section 1453(a) provides that "[i]n this section, the term[] 'class action' . . . shall have the meaning[] given . . . under section 1332(d)(1)." 28 U.S.C. § 1453(a). Section 1332(d) defines "class action" and provides that "[t]he district courts shall have original jurisdiction" over any "class action," so defined, that satisfies the amount-in-controversy requirement. 28 U.S.C. § 1332(d)(1)(B), (2). Construing CAFA to authorize removal by a third-party counterclaim defendant would have no effect on the original jurisdiction of federal courts because that jurisdiction is established by Section 1332. Jackson does not dispute that he could have filed his class action in federal court—and that if he had filed it as a stand-alone action in state court, Home Depot could have removed it.

d. Jackson also errs in arguing (at 39-45) that his view better reflects the purpose of CAFA. Congress enacted CAFA to permit large interstate (*i.e.*, diverse) class actions to be heard in federal court when the plaintiffs or a defendant so desire. Congress sought to eliminate the "parade of abuses" observed in state-court class actions by curtailing the ability of "plaintiffs' lawyers who prefer to litigate in state court to easily 'game the system' and avoid removal of large interstate class actions." S. Rep. No. 109-14, at 6, 10 (2005) (Senate Report).

Jackson agrees (at 39) that CAFA expands federal jurisdiction over certain class actions and is designed to prevent plaintiffs' lawyers from gaming the system to defeat federal jurisdiction. But Jackson errs in arguing (at 40-41) that Congress was content to allow the type of gamesmanship at issue here—*viz.*,

preventing removal by filing a removable class action as a counterclaim—because CAFA was the result of congressional compromise. The legislators who enacted CAFA compromised on its scope and substantive requirements. The Senate Report describes the bills that eventually evolved into CAFA as "compromise" versions of the bill originally introduced in 1999. Senate Report 2. Unlike the original bill, the compromise versions (and CAFA itself) apply to a smaller set of class actions and impose fewer obligations on class plaintiffs. *Compare* S. 353, 106th Cong. (1999), *with* S. 1751, 108th Cong. (2003), S. 2062, 108th Cong. (2004), *and* CAFA.

Jackson suggests (at 40) that because CAFA was a compromise, Congress was content to leave in place some (but not all) forms of gamesmanship that would override the requirements in CAFA. That is wrong. The compromises in CAFA related to *which* class actions are subject to its requirements and *what* those requirements are. But having settled those questions, it is absurd to believe that Congress further "compromised" by choosing to allow its determinations to be evaded.

More generally, this Court has held that CAFA must be interpreted *without* a presumption against removal because CAFA was "enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). Jackson ignores that holding. The Court's admonition that "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in federal court if properly removed by any defendant,'" *ibid.* (quoting Senate Report 43), combined with the plain text of

CAFA, requires a holding that Section 1453(b) authorizes removal by third-party counterclaim defendants.

B. Jackson's Alternative Arguments Provide No Basis for Affirming.

Jackson also urges (at 57-59) the Court to affirm on three alternative grounds. The Court should reject those arguments. It is worth noting that Jackson's alternative arguments ask the Court to accept that Home Depot is a "defendant" to the class action—which is exactly right.

First, Jackson argues (at 59) for affirmance because CAFA requires that any appeal of a remand order be decided within 60 days, 28 U.S.C. § 1453(c)(2), and this one was not. Because Jackson did not raise that objection in his brief in opposition, it should "be deemed waived." Sup. Ct. R. 15.2. Even if not waived, it is meritless. Jackson does not suggest—and nothing in the statute would indicate—that the 60-day rule is jurisdictional. The rule merely requires that an appeal be "denied" after 60 days (unless that period is extended "for any period of time"). 28 U.S.C. § 1453(c)(3), (4). That the appeal was instead denied (through affirmance of the remand order) after 60 days does not affect the scope of the issues properly before this Court. *See Dart Cherokee*, 135 S. Ct. at 552-553 (exercising jurisdiction where court of appeals denied request to appeal).

Second, Jackson argues (at 57-58) that the case falls within CAFA's "local controversy" exception to removability. That exception has four components, each of which must be satisfied—but Jackson cannot satisfy at least two. The local-controversy exception is inapplicable when, "during the 3-year period preceding the

filing of th[e] class action," another "class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." 28 U.S.C. § 1332(d)(4)(A)(ii). Materially identical claims, based on the same type of water-treatment systems, were filed against Home Depot less than a year before Jackson's class action. *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350 (7th Cir.), *cert. denied*, 137 S. Ct. 2138 (2017). The exception is independently inapplicable when an in-state "defendant" is not one from whom the putative class seeks "significant relief." 28 U.S.C. § 1332(d)(4)(A)(i)(II). There is no reason to believe that in-state defendant Carolina Water Systems can satisfy the large judgment Jackson seeks on behalf of the class.

Finally, Jackson questions (at 59) whether his class action satisfies CAFA's $5 million amount-in-controversy requirement. It does. According to his complaint, Jackson seeks to certify a class of "several hundred" plaintiffs. JA33. For each member of the class, he seeks damages amounting to the purchase price of the systems (approximately $9,000) plus treble damages. JA34, JA39. Recovery by even 200 plaintiffs of $27,000 would result in a damages award above the $5 million threshold.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

28 U.S.C. § 1332 provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of—

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection—

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of—

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)—

(A)(i) over a class action in which—

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant—

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which—

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal

jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim—

(A) concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

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[1] So in original. Probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which—

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply—

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1441 provides:

§ 1441. Removal of civil actions

(a) GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) JOINDER OF FEDERAL LAW CLAIMS AND STATE LAW CLAIMS.—(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all

claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) ACTIONS AGAINST FOREIGN STATES.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) MULTIPARTY, MULTIFORUM JURISDICTION.—(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title,

except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j)[1] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

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[1] So in original. Section 1407 of this title does not contain a subsec. (j).

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) DERIVATIVE REMOVAL JURISDICTION.—The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.S.C. § 1446 provides:

§ 1446. Procedure for removal of civil actions

(a) GENERALLY.—A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) REQUIREMENTS; GENERALLY.—(1) The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant,

through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.

(3) Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) REQUIREMENTS; REMOVAL BASED ON DIVERSITY OF CITIZENSHIP.—(1) A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the

plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—

(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—

(i) nonmonetary relief; or

(ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and

(B) removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).

(3)(A) If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).

(B) If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).

(d) NOTICE TO ADVERSE PARTIES AND STATE COURT.—Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(e) COUNTERCLAIM IN 337 PROCEEDING.—With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.

(g)[1] Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

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[1] So in original. Section does not contain a subsec. (f).

28 U.S.C. § 1453 provides:

§ 1453. Removal of class actions

(a) DEFINITIONS.—In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) IN GENERAL.—A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) REVIEW OF REMAND ORDERS.—

(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order.

(2) TIME PERIOD FOR JUDGMENT.—If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) EXTENSION OF TIME PERIOD.—The court of appeals may grant an extension of the 60-day period described in paragraph (2) if—

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) DENIAL OF APPEAL.—If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) EXCEPTION.—This section shall not apply to any class action that solely involves—

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

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[1] So in original. Probably should be "77p(f)(3)".

No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national voluntary bar association founded in 1946 to safeguard the right of all Americans to seek legal recourse for wrongful injury, strengthen the civil-justice system, and protect access to the courts. AAJ is the world's largest trial bar association, with members in the United States, Canada, and abroad. Throughout its 70-year history, AAJ has served as a leading advocate of the right to access to the courts for legal redress for wrongful injury.

This case is of acute interest to AAJ, because the redefinition of the basic term "defendant," as Petitioner proposes, rejects this Court's careful jurisprudence and invites a host of unintended consequences, including unwarranted expansion of federal court jurisdiction over state-law causes of action, diminution of state courts' important role in developing and defining state law, and undermining the historic right of plaintiffs to proceed in the forum of their choice.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Assuming *arguendo* that Petitioner Home Depot U.S.A., Inc. ("Home Depot") is correct in its analysis and it should be construed to be a "defendant" under the removal statutes, Home Depot would still not be able to remove this case to federal court. First, Home Depot, even as a "defendant," would not be entitled to remove this action under the law as it existed before the enactment of the Class Action Fairness Act Of 2005 ("CAFA"), because it would not be able to get the agreement of all "defendants" to that removal. Secondly, the CAFA amendments do not provide Home Depot the right to remove, because Home Depot cannot survive the "local controversy" exception to CAFA federal court jurisdiction. As a result, it will ultimately be proven that this Court does not have jurisdiction to hear this case and any opinion will accordingly be merely advisory.

While Petitioner and its amici make various claims about the public policy behind the enactment of CAFA, none of them makes even a passing attempt to relate those policy considerations to the actual facts of the case before this Court. In fact, all public policy arguments weigh in favor of this case proceeding in North Carolina state court, as the facts of this case make it the prototypical type of class action Congress expressly intended should remain in state court. Nor, as is argued by the Brief of the Retail Litigation Center, Inc. and the Chamber of Commerce of the United States of

America ("Chamber"), did Congress feel that the absence of CAFA might affect MDL jurisdiction; indeed, in the body of CAFA, Congress actually included a limitation upon the jurisdiction of MDLs. Further, the Brief of Defense Research Institute ("DRI") is categorically wrong when without any evidence it argues that state court judges are biased due to their elections being dominated by contributions from the plaintiff bar when the reality is, if anything, the opposite. The bottom line is that state courts are absolutely necessary courts of general jurisdiction in the federal scheme and the denigration of those courts by Home Depot and its amici is unwarranted.

The text and history of 28 U.S.C. §§ 1441 and 1453 make it clear that Congress never meant to confer upon "third-party counterclaim defendants" the removal rights it granted to "defendants" that were sued by the plaintiff. This Court's long-established tradition to strictly construe removal under § 1441 should not be changed, and it was not changed by CAFA and § 1453 in order to extend removal rights to third-party counterclaim defendants. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941) has been correctly viewed as limiting removal rights to only defendants sued by the plaintiff and there is no reason to change that interpretation now.

Home Depot's concerns over a great loophole opening the floodgates to federal jurisdiction are grossly overblown, as there have been relatively few

third-party counterclaim class actions in the thirteen years since CAFA became law. However, if this Court concludes that third-party counterclaim defendants may be construed to be "defendants" under the removal statutes and afforded the same rights to remove proper state court actions as defendants sued by the plaintiff(s), instead of limiting gamesmanship, it will likely usher in a new era of a vastly enlarged federal court civil docket. History shows that certain defendants have abused textual loopholes to gain federal jurisdiction when preferred, and nothing in contemporary jurisprudence indicates they won't do it again.

ARGUMENT

I. ASSUMING *ARGUENDO* THAT HOME DEPOT IS CORRECT IN ITS ANALYSIS, HOME DEPOT WOULD STILL NOT BE ABLE TO REMOVE THIS CASE TO FEDERAL COURT; AS SUCH, ANY DECISION BY THIS COURT WOULD AT BEST BE ADVISORY.

Home Depot does not dispute that the removal statutes vest the right of removal exclusively in a "defendant" who has been sued by a plaintiff in a civil action brought in state court. Instead, the consistent thrust of Home Depot's argument is that it should also be regarded as a "defendant" and, therefore, enjoy all of the removal rights accorded to the defendants sued by the plaintiff. Thus, under Home Depot's proposed formulation there would actually be three defendants in this action that could

seek removal rights under the removal statutes: Mr. Jackson, an individual residing in North Carolina and the defendant sued by the plaintiff; Home Depot, a Georgia-based, publicly traded company and third-party counterclaim defendant, Pet. for a Writ of Certiorari at ii;[2] and Carolina Water Systems, Inc. ("CWS"), a North Carolina-based third-party counterclaim defendant, Respondent's Brief ("RB") 58 (citing Dist. Ct. Dkt. No. 24, at 16-17).[3] Yet, even if Home Depot is correct, Home Depot would still not be entitled to remove this action.

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[2] *See also* Corporate Office Headquarters, *The Home Depot, Inc.*, http://www.corporate-office-headquarters.com/the-home-depot-inc (last visited December 13, 2018).

[3] Publicly available information describes CWS as follows: "Business Description Carolina Water Systems, which also operates under the name Rainsoft Water Treatment, is located in Charlotte, North Carolina. This organization primarily operates in the Water Purification Equipment business / industry within the Miscellaneous Retail sector. This organization has been operating for approximately 21 years. Carolina Water Systems is estimated to generate $4.2 million in annual revenues, and employs approximately 29 people at this single location." Buzzfile, Carolina Water Systems Inc. Business Description, http://www.buzzfile.com/business/Rainsoft-Water-Treatment-704-921-1950 (last visited December 13, 2018).

A. Home Depot, Even as a "Defendant," Would Not Have Been Entitled to Remove this Action Under the Law as it Existed Before the Enactment of CAFA.

Before CAFA was enacted, the only avenue for removal of this action by Home Depot would have been under the diversity provisions of 28 U.S.C. § 1332(d). However, such removal would not have been possible, because when § 1441(a) provides the sole basis for removal, "all defendants who have been properly joined and served must join in or consent to the removal of the action." 28 U.S.C. § 1446(b)(2)(A). Indisputably, Mr. Jackson, who has been properly joined and served, has not consented to removal. Therefore, even if this Court construed Home Depot to have been a defendant pursuant to § 1441(a), Home Depot could not remove this action to federal court. The plain text of the removal statutes requires Mr. Jackson's consent and Home Depot has never had that.

While there can be no question that Mr. Jackson is a defendant as defined by § 1441(a), even if Mr. Jackson were somehow considered a "plaintiff,"[4] Home Depot still could not remove based

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[4] This Court has already determined that Mr. Jackson, having not initiated the original proceeding, may not be considered a "plaintiff." Even in the more liberal context of CAFA, in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169-170 (2014) this Court held that when Congress used the

upon the traditional diversity statutes. An action "may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought," § 1441(b)(2), and Defendant CWS is a citizen of North Carolina. Further, pursuant to § 1332(a), no diversity jurisdiction exists over cases in which any plaintiff is a citizen of the same state as any defendant, and here both Mr. Jackson and CWS are North Carolina citizens.

B. Even if Home Depot is Considered To Be a "Defendant," CAFA Would Still Not Provide Home Depot With an Alternate Basis for Successful Removal.

Post-CAFA § 1332(d)(4) specifically exempts local controversies, such as this, from federal court jurisdiction. Section 1332(d)(4) provides that that there is no federal court jurisdiction under CAFA when four criteria are met: (1) "greater than two-thirds of the members of all proposed plaintiff classes . . . are citizens of the State in which the action was originally filed"; (2) "at least" one defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims" is "a citizen of the State in which the action was originally filed"; (3) "principal injuries resulting from the alleged conduct or any related

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word "plaintiffs," it intended the term to have its ordinary meaning as used in the Federal Rules of Civil Procedure.

conduct of each defendant were incurred in the State in which the action was originally filed"; and (4) "during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." § 1332(d)(4).

Before the courts below, Mr. Jackson properly raised the local controversy exception. RB 57-59. The facts as summarized below lead inexorably to the conclusion that there is no federal court jurisdiction even if Home Depot is considered a "defendant" for purposes of its ability to remove this action under the CAFA amendments.

The class at issue includes all people who purchased water-treatment systems from Home Depot and CWS, with class members residing almost entirely within the state of North Carolina. Joint Appendix ("JA") 62. Home Depot's own records show that out of 286 purchasers, 259 have North Carolina addresses. Dist. Ct. Dkt. No. 42-1, at 5-15. Thus, approximately ninety percent of the proposed class—greater than the two-thirds required—are citizens of North Carolina. *Id.* Third-party counterclaim defendant CWS is a citizen of North Carolina, meaning that "at least" one defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims" is an in-state defendant. The class definition shows that the principal injuries of the alleged North Carolina water-treatment scheme occurred in

North Carolina. Dist. Ct. Dkt. No. 24, at 18-19. Finally, the record reveals that no other class action asserting similar factual allegations against Home Depot or CWS was filed in the three years preceding Mr. Jackson's counterclaims. *Id.* at 19. Given this, CAFA does not provide federal court jurisdiction to Home Depot even if it is considered to be a "defendant" trying to remove.

C. Ultimately It Will Be Proven That this Court Does Not Have Jurisdiction to Hear this Case and Any Opinion Will Accordingly Be Merely Advisory.

This Court made clear in *Grupo Dataflux v. Atlas Global Grp., L.P.* that by "whatever route a case arrives in federal court, it is the obligation of both district court and counsel to be alert to jurisdictional requirements." 541 U.S. 567, 593 (2004) (citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), which states that "every federal appellate court has a 'special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it" (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

Here, the bottom line is that despite the questions accepted for review by this Court, as has been shown above, federal courts do not have the underlying jurisdiction to hear this case. When a lower district court lacks jurisdiction, this Court's

only jurisdiction on appeal is "not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit." *United States v. Corrick et al.*, 298 U.S. 435, 440 (1936) (footnotes omitted). *See also Foster v. Chatman*, 136 S.Ct. 1737, 1763 (2016) (Thomas, J., dissenting) (warning that proceeding further without establishing the Court's jurisdiction will lead to "an impermissible advisory opinion."). Such an impermissible advisory opinion would be the ultimate fate of any decision this Court renders here. Simply put, Congress did not confer jurisdiction on Article III federal courts to render advisory opinions. *See Muskrat v. United States*, 219 U.S. 346, 354-56 (1911).

II. CONTRARY TO THE PROTESTATIONS OF HOME DEPOT AND ITS AMICI, ALL PUBLIC POLICY ARGUMENTS WEIGH IN FAVOR OF THIS CASE PROCEEDING IN NORTH CAROLINA STATE COURT.

A. Home Depot and Its Amici Recite Rote Descriptions About Class Actions Absent Case or Documentary Support, Ignoring That this is the Prototypical Class Action That Congress, When Enacting CAFA, Intended Would Remain in State Court.

Home Depot's amici resuscitate a time-worn parade of supposed horrible conduct perpetrated by class counsel and the class actions they bring. Many of their citations and references regarding the

problematic nature of class actions come from The Class Action Fairness Act of 2005, S. Rep. No. 109-14 (2005) ("Senate Report"). *See* Chamber 18-19, Brief of Washington Legal Foundation and Allied Educational Foundation ("WLF") 30, DRI 5, 9-10. These descriptions by their very nature are at best descriptive of a pre-CAFA world. However, in this post-CAFA world, Chamber goes to great lengths to explain that CAFA was a huge success and has worked quite well. Chamber 3, 5, 13, 20.[5]

It is to the detriment of this ostensibly massively-improved post-CAFA federal court world that Home Depot and its amici argue plaintiffs have discovered a "giant loophole" which could bring down the efficient CAFA edifice. Petitioner's Brief ("PB") 42. The result would do serious harm to CAFA's overriding purpose – the critical need for federal jurisdiction of interstate cases of national importance. *See, e.g.*, Chamber 20, DRI 7, WLF 13.

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[5] But for a contrary view, see Wiley E. Rice, *Allegedly "Biased," "Intimidating," and "Incompetent" State Court Judges and the Questionable Removal of State Law Class Actions to Purportedly "Impartial" and "Competent" Federal Courts -- A Historical Analysis of Class Action Dispositions in Federal and State Courts, 1925-2011*, 3 Wm. & Mary Bus. L. Rev. 419, 559-60, 568 (April 2012) ("[t]he research and empirical findings in this Article strongly suggest: (1) CAFA's highly questionable removal and jurisdictional rules evolved from untruths or just plain fabrications, and (2) the new rules undermine the principles of judicial federalism."). In this extensive study, Professor Rice analyzed and coded 2,657 federal and state court class actions and ordinary decisions.

Yet, neither Home Depot nor its amici ever make even a passing attempt to relate the actual facts at issue before this Court to their doom and gloom scenario. The reason is obvious. This case is not what has been defined as an interstate case nor can it conceivably be considered a case of national rather than North Carolina importance. The alleged fraudulent scheme in question was perpetrated within the state of North Carolina to almost entirely North Carolina residents and has been brought pursuant to North Carolina law, including allegations of violation of the rather unique North Carolina Referral Sales Statute (N.C. Gen. Stat. § 25A-37.). The defendant that Home Depot was allegedly in cahoots with is based in North Carolina. And from purely a public policy perspective, even Home Depot can hardly be considered the type of disadvantaged "out of state" resident the framers sought to protect. *See* PB 25, WLF 23. Home Depot has 39 locations within the state of North Carolina.[6]

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[6] On its website, Home Depot lists the following North Carolina locations: Apex; Asheville; Battleground; Burlington; Cary; Cornelius; Durham; E. Charlotte; E. Greensboro; Fayetteville; Fuquay Varina; Garner; Gastonia; Greensboro; Hendersonville; Hickory; High Point; Hillsborough; Jacksonville; Kannapolis; Kitty Hawk; Knightdale; Matthews; Myrtle Grove; North Durham; Northwest Raleigh; Pineville; S. Boulevard Charlotte; Shallotte; South Charlotte; Statesville; Steele Creek; University; W. Asheville; Wake Forest; Wendover; Wilmington; and Winston Salem (2). *See* The Home Depot, *Store Finder*, https://www.homedepot.com/l/search/north%20carolina/full/?lat=35.760336605333244&lng=79.22108101843261&radius=100 (last visited December 13, 2018).

Instead, this case is a prototype of the type of case Congress concluded should remain in state court even after CAFA was enacted. At page 41 of the Senate Report, an example of a class action brought against a Florida funeral home is described as one that "would remain in state court" even after CAFA. In the example, just as here, "about 90 percent" of the class members are residents of the state where the action is brought. Similar to the third-party crossclaim defendants here, the example describes one in-state resident defendant along with an out-of-state defendant. And just as here, no other class action has been filed regarding the issues of concern. As a result, the Senate Report concludes: "This is precisely the type of case for which the Local Controversy Exception was developed . . . the controversy is at its core a local one, and the Florida state court where it was brought has a strong interest in resolving the dispute." *Id.*

B. In Contrast to the Protestations of Amici Chamber, When Congress Passed CAFA, It Expressly Did Not Show a Desire to Enhance the Coverage of MDL Jurisdiction.

In 1968, Congress created the multidistrict litigation device and, to administer it, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel"). *See* 28 U.S.C. § 1407. Amici Chamber argue without explanation that the failure of this case to proceed in federal court will somehow undermine the entire MDL system. Chamber 8-11.

How this would happen is unclear. There is no MDL referenced that the within action might be a part of nor is there an explanation as to how a consumer fraud action for North Carolina residents against a North Carolina company for conduct committed almost entirely in North Carolina would become part of an MDL. Moreover, there is certainly no attempt to demonstrate that a federal court would handle this matter more efficiently than a North Carolina state court, particularly when most of the issues are peculiar to North Carolina law.

Furthermore, the actual text of 28 U.S.C. § 1407 demonstrates that Congress did not view the MDL procedure as a panacea for all similar claims as those claims removed pursuant to CAFA. In fact, subsections § 1332(d)(11)(C) and (D), enacted as a part of CAFA, state that when a mass action is removed to a federal court under CAFA's new provisions, it **may not** be transferred to another federal court under the MDL statute (§ 1407) unless a majority of the plaintiffs request such a transfer. This is hardly the ringing endorsement of the MDL process proffered in Chamber's brief, but rather a Congressional expression of keeping local matters local.

C. The State Courts Are Necessary Courts of General Jurisdiction and the Much Smaller Federal Court System Is Limited in Its Jurisdiction.

Home Depot and its amici spend much time denigrating the state court system. PB 43-45, Chamber 16-17, DRI 7-15, 19-21. They ignore the fact that from the founding of our Republic, the expectation has been that the state courts would be the primary forum for the protection of rights and interests of citizens and that the power of the federal courts and Congress itself would be carefully confined or limited. Indeed, from 1789 through to the present, the 10th Amendment has made it explicit that the states are to play a vital role in protecting the interests of citizens. "[The] Tenth Amendment was adopted specifically to ensure that the important role promised the States by the proponents of the Constitution was realized." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 (1985) (Powell, J., dissenting).

As a result, this Court has long recognized the hazard of undue assertion of federal power. "[T]he scope of this [federal] power must be considered in the light of our dual system of government, and may not be extended so as to . . . effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones and Laughlin Steel Co.*, 301 U.S. 1, 37 (1937).

This deference is necessary not only constitutionally but administratively. The vast majority of litigation in the United States takes place in state courts. As of 2012, there were 94 federal district courts as against approximately 2,177 state trial courts of general jurisdiction with approximately 10,387 state judges trying cases. *See Rice, supra footnote 5*, at 559-60.

State court cases touch on every aspect of modern life and every imaginable type of dispute, including many that have their origin in federal law. Indeed, the development of tort law and its guiding principles are indebted to legal issues first resolved by state courts. Just one example is the seminal decision by Justice Benjamin Cardozo in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). Tort law students are trained in the decisions of California Justices Malcolm Lucas and Roger Traynor.

"History and precedent affirm the virtue of state courts to protect citizens, evolve new standards, and achieve just and fair resolution of claims." Andrew F. Popper, *On The Necessity of Preserving Access to State Courts and Civil Justice: Rediscovering Federalism & Debunking "Fraudulent" Joinder*, 44 Rutgers L. Rec. 160, 170 (2017) (citing Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (2012), which states "Margaret Marshall, the recently retired chief justice of the Massachusetts Supreme Judicial Court said "From

the people's point of view, justice in America is delivered first and foremost through the state courts[.]")). Home Depot and its amici's general denigration of the state court system is, to say the least, unfortunate.

D. Amicus DRI Is Categorically Wrong in Its Characterization of State Judges as Being Biased Due to Their Elections Being Dominated by Contributions from the Plaintiffs' Bar.

Without any evidentiary support, DRI claims state court bias due to the fact that "state-court trial judges' electoral campaigns routinely receive substantial financial support from the plaintiffs' bar." DRI 7. However, the empirical evidence shows the exact opposite. For instance, during 2011 and 2012, the Ohio Republican Party was the highest donor nationally, followed by large defense firms, many of which are presumably members of DRI. *See* Followthemoney.org, *Courting Donors: Money in Judicial Elections, 2011 and 2012*, https://www.followthemoney.org/research/institute-reports/courting-donors-money-in-judicial-elections-2011-and-2012#item_1.

In fact, a 2013 study shows that business interests, not plaintiff lawyers, dominate judicial election financing and that the votes of justices are influenced by these contributions. *See* Joanna Shepherd, *Justice At Risk – An Empirical Analysis*

Of Campaign Contributions And Judicial Decisions, American Constitution Society for Law and Policy (June 2013), *available at* https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/JusticeAtRisk_Nov2013.pdf.

More recently, a report by The Brennan Center noted that "[o]ne of the most striking aspects of the 2015-16 cycle was the sharp rise in outside spending — most of it non-transparent — by political action committees, 'social welfare organizations' incorporated under 501(c)(4) of the Internal Revenue Code, and other non-party groups, mirroring the trends in regular political races, both state and federal." Alicia Bannon *et al.*, *Who Pays for Judicial Races?*, 7 (2017), *available at* https://www.brennancenter.org/sites/default/files/publications/Politics_of_Judicial_Elections_Final.pdf.

Thus, DRI's naked suggestion that state courts are impermissibly biased because they "receive substantial financial support from the plaintiffs' bar" should be flatly rejected as entirely without support. While state courts certainly have a strong interest in providing a forum for their citizens, this does not suggest a bias or lack of fairness. Rather, it suggests the proper role of state courts, which has been repeatedly acknowledged by this Court. *See San Remo Hotel, L.P. v. City and Cnty. of S.F.*, 545 U.S. 323, 347 (2005); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 449 (2001); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930 (1975).

III. ITS TEXT AND HISTORY MAKE IT CLEAR THAT CONGRESS NEVER MEANT TO INCLUDE "THIRD-PARTY COUNTERCLAIM DEFENDANTS" WHEN IT GRANTED REMOVAL RIGHTS TO "DEFENDANTS."

A. Congress Intended to Grant Removal Rights Only to Traditional Defendants.

In 1875, Congress "greatly liberalized" removal practice by allowing "either party" to remove a case to federal court. *See* Judiciary Act of 1875, ch. 137, 18 Stat. 470, 471 (1875) (permitting removal in a case "wholly between citizens of different States, and which can be fully determined as between them," by "either one or more of the plaintiffs or defendants actually interested in such controversy"). Within twelve years, Congress recoiled from the vast expansion of the federal docket and replaced the "either party" language of the 1875 Act with "the defendant or defendants therein" language that eventually made its way into the 28 U.S.C. § 71 (1940) that was considered by this Court in the seminal case of *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). *See* Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887).

In 1911, with some alterations in language, this statute became § 28 of the Judicial Code (Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1094-1095 (1911) (codified at 28 U.S.C. § 71 (1940)), and in 1948, with additional alterations, it migrated to § 1441 (Act of

June 25, 1948, ch. 646, Pub. L. No. 80-773, 62 Stat. 869, 937-938 (1949)). Today, § 1441(a) governs removal in the absence of another, more specific removal provision.

In *Shamrock Oil*, this Court unequivocally held that in interpreting the removal statute, the phrase "the defendants or defendants therein" means what it says and provides only that the defendant(s) sued by the plaintiff(s) in a case have the right to remove. 313 U.S. at 104-109. This Court's reasoning focused on the history and language of the various iterations of the removal statute. *Id.* at 105-108. In particular, the first removal statute, § 12 of the Judiciary Act of 1789, allowed only "the defendant" to remove a case. *See* Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1845); *see also Shamrock Oil*, 313 U.S. at 105-106. This Court further found that the specificity of the word "defendant" standing alone is clear, which to this day has not changed and should govern this Court's answer to the question presented regarding *Shamrock Oil*: *Shamrock Oil's* removal bar does "extend to third-party counterclaim defendants," because they have never been considered to be "defendants" to an action brought by a plaintiff as that word was used at the time the language in question was first drafted through to today.

This Court has long mandated that jurisdictional statutes, particularly removal statutes, must be textually limited. *See Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546, 558 (2005) (stating that "[w]e must not give

jurisdictional statutes a more expansive interpretation than their text warrants."); *Kokkenen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

The starting point of any textual analysis of a statute is the plain language of the statute and here that language only uses the word "defendant" rather than the word "defendant" with some preceding descriptive language, such as "third-party," "cross-," or "third-party counterclaim." "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113 (1850). Here, the word "defendant," standing on its own, has long commonly meant a party sued by a plaintiff.

This is because textually a "third-party defendant" is "[a] party brought into a lawsuit by the original defendant." Black's Law Dictionary (10th ed. 2014) (emphasis added). Here, of course, Home Depot is one of the third-party counterclaim defendants brought into the action in state court by Mr. Jackson and would never commonly be referred to as the "defendant." Home Depot's reliance on an idiosyncratic revamping of the meaning of the word "defendant" is unavailing against the more specific generally used term "third-party defendant" that in common parlance describes its status. *See, e.g.*, Fed.

R. Civ. Pro. 14 (Third Party Practice) (which would be rendered meaningless if Rule 14 was made applicable to all or "any defendants"). Moreover, Home Depot and its amici "supply no persuasive proof that Congress sought to invoke their idiosyncratic definition" of the word "defendant" when enacting the removal statutes. *See Wisconsin Cent. Ltd. v. United States*, 138 S.Ct. 2067, 2072-73 (2018) ("while the term 'money' *sometimes* might be used in this much more expansive sense, that isn't how the term was *ordinarily* used at the time of the Act's adoption (or is even today).").

Moreover, this Court in *Shamrock Oil* bolstered its interpretation of § 71 with a policy argument: the desirability of "strict construction" of "acts of Congress regulating the jurisdiction of the federal courts." 313 U.S. at 108. "Due regard for the rightful independence of state governments," this Court noted, requires the federal courts to "scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Id.* at 109 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934) (internal quotation marks omitted)). It did not and could not have meant to expand that jurisdiction by allowing third-party counterclaim defendants removal rights. For more than 200 years, with only a short break, removal textually has been limited to those "defendants" sued by the plaintiff. Defendant, as a term standing alone, means the party sued by the plaintiff. This is consistent with this Court's recent guidance that "[i]f the statutory language is plain,

the Court must enforce it according to its terms." *King v. Burwell*, 135 S.Ct. 2480, 2483 (2015).

B. This Court's Long-Established Tradition to Strictly Construe Removal Under § 1441 Was Not Changed By CAFA and § 1453 in Order to Extend Removal Rights to Third-Party Counterclaim Defendants.

This Court's long-established tradition to narrowly construe removal under § 1441 as expressed in *Shamrock Oil* should be followed unless it was specifically prohibited by the clear meaning of the textual provisions of § 1453. It was not.

With the passage of CAFA, Congress expressed its intention to expand removal in discrete ways by amending various sections of 28 U.S.C. §§ 1332, 1446, and 1447. Importantly, CAFA did not completely rewrite or replace the removal statute § 1441 in its entirety. Rather, removal under CAFA, codified as § 1453, is an entirely separate procedural statute that adds discrete, specific, changes, none of which changed or altered § 1441 removal in a way that would permit a third-party counterclaim defendant to remove an action to federal court. Indeed, a careful, textual, examination of § 1453 reveals that it clearly does not confer removal authority to third-party counterclaim defendants.

Here, the last clause of § 1453(b) provides that certain actions "may be removed by any defendant

without the consent of all defendants." Home Depot has glommed onto the word "any" in order to provide a reading to this phrase that is not described in the Senate History nor any other similar statute. Clearly, when read in its context, the use of the word "any" only alters this Court's rule requiring the unanimous consent of all defendants in cases not subject to CAFA.[7] *See, e.g., Chi., Rock Island, & Pac. Ry. Co. v. Martin*, 178 U.S. 245, 247-48 (1900) (stating that because the removal statute "is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition"). CAFA does not, as Home Depot and its amici argue, expand the removal statute, § 1441, to include removal rights for third-party counterclaim defendants.

This Court's canon is to follow ordinary usage of a term, such as "defendant," unless Congress specifically provides a specified or technical meaning. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989). Here, Congress did not provide a specified or technical meaning to the word "defendant" when it is used in the phrase "any defendant." Thus, regardless of the use of the adjective "any," there is absolutely no reason to

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[7] Notably, the unanimous consent requirement of § 1446(b)(2)(A) has not been extended to third-party counterclaim defendants when a defendant has sought removal pursuant to § 1441(a).

believe that Congress meant to change the meaning of the word "defendant." Certainly, Congress cannot reasonably be believed to have meant that the use of the word "defendant" in "any defendant" would mean something different from the same word "defendant" it had been using in the phrase "a defendant or defendants" for more than 100 years – nor that such a novel definition of the word "defendant" would be readily apparent to those reading the new statute.

If Congress had desired to alter the understanding of such an enduring term as "defendant" to suddenly include "third-party counterclaim defendants," it would not have done so subtly and silently. To the contrary, it can be presumed that a prior legal rule should be retained if no one in legislative deliberations even mentioned the rule or discussed any changes in the rule. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991). This is described as the "dog didn't bark" canon, which is particularly relevant here, because Congress never even mentioned, much less discussed, providing removal rights to a third-party counterclaim defendant, such as Home Depot, or enlarging the ambit of the word "defendant" to include third-party counterclaim defendants.

Under both §§ 1441(a) and 1453(b), the text of these statutes simply does not permit a third-party counterclaim defendant to remove a case to federal court. Congress is presumed to know the legal landscape against which it legislates. Applying the

long-standing, well-established rules and canons of statutory interpretation, if Congress wants to overturn a precedent, it can do so expressly. As to third-party counterclaim defendants, such as Home Depot, Congress was meaningfully silent. There can only be one conclusion. The plain text of §§ 1441 and 1453 do not permit a third-party counterclaim defendant to remove a case to federal court. This should end the inquiry.

Finally, while this Court in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S.Ct. 547, 554-55 (2014) has interpreted CAFA, and in particular, § 1453, to be read broadly, that does not mean § 1441 should now be read beyond the words Congress chose to include in the statute. When there is nothing in the text of CAFA or in the Congressional record that even suggests that Congress intended § 1441 to be read broadly, there is no textual or historical basis to change this Court's *Shamrock Oil* decision and now read § 1441 in favor of removal by a separately described entity, a third-party counterclaim defendant. Moreover, as is discussed below, to do so would be to broadly expand federal jurisdiction, which the Constitution, Congress, and this Court have consistently limited.

C. Home Depot Cannot Use Congress' Silence on Its Idiosyncratic Interpretation of "Defendant" To Support That Unique Interpretation.

In order to support its idiosyncratic reinterpretation of the word "defendant, Home Depot and its amici (WLF 21-22) seek to persuade this Court to assume a lack of Congressional awareness of judicial precedents on existing statutory schemes. But *Cannon v. Univ. of Chi.*, 441 U.S. 677, 696-98 (1979) clearly stands for the proposition that Congress is presumed to know the existing laws and their interpretation when it drafts new legislation. *See also Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 554 (1995); *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 362 n.3 (2006). Additionally, this Court has held that "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute. [Citation.]." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1624 (2018).

There can be little question that long before CAFA was adopted the word "defendant" was consistently interpreted to mean only the party sued by the plaintiff(s) and not "third-party counterclaim defendants." Where there is a "settled judicial construction," this Court has applied the "presumption that Congress was aware of these earlier judicial interpretations and, in effect,

adopted them." *Keene Corp. v. U.S.*, 508 U.S. 200, 212 (1993) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Even the authority cited at WLF 21-22, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, states, "[w]hen Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language." 511 U.S. 164, 185 (1994).

WLF's separate reliance on *Alexander v. Sandoval* is misplaced, as it is in conflict with Home Depot's statement throughout its briefing of the extensive and lengthy study Congress undertook in adopting CAFA. *See* PB *passim*; *see also* Chamber 14. It certainly is not true about CAFA that "Congress [did] not comprehensively revis[e] a statutory scheme but has made only isolated amendments" that would call into question its approval of the court's interpretations. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). As is discussed by amici Chamber, CAFA resulted from a "grinding eight-year effort" and "required an exceedingly rare level of persistence and, ultimately, bipartisan cooperation." Chamber 14. Under these circumstances, it is ludicrous to think that Congress was not aware of prior precedents when CAFA was enacted.

IV. IF THIS COURT CONCLUDES THAT "THIRD-PARTY COUNTERCLAIM DEFENDANTS" MAY REMOVE ACTIONS TO FEDERAL COURT, INSTEAD OF LIMITING GAMESMANSHIP, IT WILL USHER IN A NEW ERA OF A VASTLY ENLARGED FEDERAL DOCKET.

A. Home Depot's Concerns Are Grossly Overblown; There Have Been Relatively Few Third-party Counterclaim Class Actions in the Thirteen Years Since CAFA Became Law.

Home Depot argues that upholding the Fourth Circuit's reading of CAFA as consistent with all prior removal statutes would somehow result in a dystopian world of class-action litigation where plaintiffs' attorneys would devote their time to combing over dockets for "a debt-collection proceeding or other minor state-court litigation to use as a vehicle for asserting an interstate class-action claim against an entity that is not even a party to the state-court action." PB 43.

Then, without evidentiary support of any pattern or practice on the part of the Plaintiffs' bar, Home Depot alleges that the uniform decisions of the Fourth, Sixth, Seventh, and Ninth Circuits "provide a roadmap for circumventing" what it asserts is the clear purpose of CAFA to "combat the observed biases against out-of-state defendants." *Id.*

In support of its position, Home Depot cites to articles fretting about a perceived risk without identifying any actual tsunami of state court class actions resulting from the appellate cases they point to as allegedly opening up the floodgates.[8] The reality is that there have been remarkably few cases that have needed to address this issue, much less enough to necessitate asking this Court to wade into an area where there is no split of authority among the Circuits and the appellate court decisions are remarkably consistent. The paucity of cases falling into the category of third-party counterclaim class actions over the thirteen years since CAFA was enacted is striking. All of two circuit courts ruled on this issue prior to this Court's decision in *Dart Cherokee*. *See Progressive West Ins. Co. v. Preciado*, 479 F.3d 1014, 1017 (9th Cir. 2007); *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 332-33 (4th Cir. 2008).[9] And just two more circuit courts have

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[8] For instance, Home Depot cites as authority a "legal opinion letter" from Dan Himmelfarb disparaging the Fourth Circuit's holding in *Palisades* without disclosing that Mr. Himmelfarb represented the appellants in that case. PB 42-43. His views, far from being scholarly insight, were an extension of his advocacy in that case. Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, Legal Opinion Letter (Wash. Legal Found.), Apr. 10, 2009, at 2.

[9] Home Depot's position at PB 10 that *Dart Cherokee* somehow overruled *Palisades* and its progeny by holding that there is no "antiremoval presumption" under CAFA is incorrect because it misstates the basis for the Fourth Circuit's decision. *Dart Cherokee*, 135 S. Ct. at 554. *Palisades* certainly recognized that

ruled after this Court's decision in *Dart Cherokee*, with both rulings being consistent with the first two circuits. *See Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 356 (7th Cir. 2017); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849, 854 (6th Cir. 2012) ("*MERS*"); *First Bank v. DJL Props., LLC*, 598 F.3d 915, 916-17 (7th Cir. 2010). Equally remarkable is the extremely small number of counterclaim class actions Home Depot and its amici have been able to cite to which have not generated circuit court decisions. *See* PB 39, Chamber 13, PLC 8, and DRI 18.

Absent evidentiary support or any pattern of abuse, Home Depot's floodgate fears are nothing more than a lament that it is "stuck litigating a large class action in a state court of someone else's choosing" — as if its business decision to partner in a predatory scheme to defraud North Carolina consumers was not a choice. PB 45.

There is simply nothing in the cases Home Depot and its amici point to as creating a roadmap to defeat CAFA actually operating that way. Instead, there is remarkable consistency among the circuits in the way CAFA was intended to apply.

"Congress clearly wished to expand federal jurisdiction through CAFA." *Palisades*, 552 F3d. at 336.

B. If This Court Rules As Home Depot Wishes, the Much Greater Risk Will Be That Some Defendants Will Attempt to Game the System In Order to Gain Their Preferred Jurisdiction.

On the facts of this case, Home Depot is arguing that when the word "defendant" is used in the removal statutes, it must be read to mean that third-party counterclaim defendants are among those permitted to remove a case to federal court. If this Court agrees, instead of closing what Home Depot and its amici describe as a "loophole," it is much more likely that the door will be left wide open for defendants to game the system and remove state-based cases of all types to federal court.

Well before CAFA was enacted, defendants attempted this gamesmanship. In *Dauenhauer v. Superior Court*, after plaintiff filed his complaint, a defendant filed a cross-complaint against Utah Home Fire Insurance Company. 149 Cal.App.2d 22, 24 (3rd Dist. 1957). Utah Home Fire Insurance Company, joined as an out-of-state cross-defendant, removed the case. *Id.* It was subsequently and correctly remanded. *Id.* However, if such a third-party counterclaim removal is now sanctioned, any in-state tort defendant could implead its out-of-state insurance company to gain a federal venue.

The reality is that there would be no shortage of cases involving out-of-state third-party

counterclaim defendants that could provide in-state defendants with a means to escape from state courts they do not like. *See, e.g., United Founders Life Ins. Co. of Ill. v. Blackhawk Holding Corp.*, 341 F. Supp. 483 (E.D. Wis. 1972) (finding in the absence of diversity of citizenship between a plaintiff and one or more defendants, crossclaim involving defendants among whom there was diversity cannot provide a basis for removal); *Verschell v. Fireman's Fund Ins. Co.*, 257 F. Supp. 153 (S.D.N.Y. 1966) (holding that fire insurer was not entitled to remove to federal court action against it that was brought by insured's assignee); *Morris v. Marshall Cty. Bd. of Educ.*, 560 F. Supp. 43 (N.D.W. Va. 1983).

While it is now rather settled law that third-party counterclaim defendants cannot initiate removal proceedings, other early cases in which such removal was attempted highlight the ability defendants would have if this Court accepts Home Depot's argument. Gaming of the system could occur particularly in product liability cases. In *Share v. Sears, Roebuck & Co.*, 550 F. Supp. 1107 (E.D. Pa. 1982), the plaintiff brought suit against Sears for injuries he received operating a lawn mower purchased at the department store. Sears, in turn, filed a third-party complaint against the lawn mower manufacturer, seeking indemnification for any damages. The manufacturer removed the case on the basis of diversity. The court found that a third-party defendant is not a "defendant" within the meaning of the removal statute and, therefore, the manufacturer did not have standing to remove

the case. *Id.* at 1108-09. Similarly, in *Hyde v. Carder*, 310 F. Supp. 1340 (W.D. Ky. 1970), the defendant beverage distributor filed a third-party action for indemnification after it was sued for damages when the plaintiff was injured by an exploding bottle. Other similar liability cases would readily end up removed to federal court. *See, e.g., Holloway v. Gamble-Skogmo, Inc.*, 274 F. Supp. 321, 323-24 (N.D. Ill. 1967) (involving a defective tire); *White v. Baltic Conveyor Co.*, 209 F. Supp. 716 (D.N.J. 1962) (involving defective installation of a conveyor belt); *Marshall v. Navco, Inc.*, 152 F. Supp. 50, 54 (S.D. Tex. 1957) (involving worker injuries); *Schoneweather v. L. F. Richardson, Inc.*, 122 F. Supp. 692, 693 (W.D. Mo. 1954) (involving injuries from the negligent installation of a heating unit).

Such potential for removal would extend to cases outside of the tort realm. A lawsuit against a car dealer for rescission and damages would have been removed after the dealer filed a third-party complaint against the manufacturer. *See, e.g., Tuyagda Aluminum Prods. Corp. v. Hull Dobbs 65th Infantry Ford, Inc.*, 313 F. Supp. 774 (D.P.R 1970). Allowing defendants to game the system for even the most basic of contract disputes would overrun the federal courts.

One case shows the absurd results that Home Depot's interpretation could bring about. In *Croy v. Buckeye Int'l, Inc.*, 483 F. Supp. 402 (D. Md. 1979), it was a fourth-party defendant that sought removal. The court held that a fourth-party defendant is not

a "defendant" under the removal statute. Conceivably, if this well-crafted limitation is lifted from third-party counterclaim defendants, every hyphenated defendant down the chain, no matter how removed from the original claim, could remove the action. Federal courts would be overwhelmed.

C. History Shows That Certain Defendants Have Used Such Loopholes to Gain Their Preferred Federal Jurisdiction.

In fact, a number of defendants have already been gaming removal jurisdiction through the artifice of checking filings and removing cases before they have been "properly joined and served," thereby gaming the language of § 1441(b)(2). *See Phillips Constr., LLC v. Daniels Law Firm, PLLC*, 93 F. Supp. 3d 544, 554 n.2 (S.D.W. Va. 2015). *See also Harvey v. Shelter Ins. Co*, Civ. A. No. 13-392, 2013 WL 1768658, *2 (E.D. La. Apr. 24, 2013). ("[T]he plain language of the statute must prevail over the plaintiff's policy arguments to the contrary. The statutory forum defendant rule simply does not support plaintiff's position."); *City of Ann Arbor Emps. Ret. Sys. v. Gecht*, No. C-06-7453 EMC, 2007 WL 760568, *8-10 (N.D. Cal. Mar. 9, 2007) (holding that the court was "constrained by the plain language of § 1441(b)" but also stating that plaintiff's argument that the resident defendant engaged in gamesmanship "is not without merit-indeed, has a great deal of appeal"); *Poznanovich v. AstraZeneca Pharm. LP*, Civ. A. No. 11-4001 (JAP),

2011 WL 6180026, *3 (D.N.J. Dec. 12, 2011) (courts following the plain meaning approach "acknowledge in some way 'the colorable policy arguments that it is unjust that a properly joined defendant could monitor state court dockets and remove cases prior to being served, and that it makes little sense to provide a federal forum to an in-state defendant upon removal of a diversity case,' [but] these decisions found such arguments to be insufficient to overcome the requirement that a court give meaning to the plain language of the statute.").

No doubt, "Congress could not possibly have anticipated the tremendous loophole that would one day manifest from technology enabling forum defendants to circumvent the forum defendant rule by, *inter alia*, electronically monitoring state court dockets." *Sullivan v. Novartis Pharm. Corp.*, 575 F. Supp. 2d 640, 645 (D.N.J. 2008). Yet, this loophole would be *de minimus* when compared to the floodgates that would open up if third-party counterclaim defendants receive removal rights.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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No. 17-1471

In The Supreme Court of the United States

HOME DEPOT U.S.A., INC.,

Petitioner,

v.

GEORGE W. JACKSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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INTEREST OF THE *AMICUS CURIAE*[1]

DRI–The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 20,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers; promoting appreciation for the role of defense lawyers in the civil justice system; anticipating and addressing substantive and procedural issues germane to defense lawyers and fairness in the civil justice system; and preserving the civil jury. To foster these objectives, DRI participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

DRI is participating as *amicus curiae* in this appeal because achieving *fairness* in class-action litigation is fundamental to civil justice. Class-action fairness begins with the critical need for an impartial trial court—a court competent to determine whether a putative class action should be allowed to proceed beyond the pleadings and threshold dispositive

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[1] In accordance with Supreme Court Rule 37.6, *amicus curiae* DRI–The Voice of the Defense Bar certifies that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief. Petitioner's and Respondent's counsel of record have consented to the filing of this brief.

motions, and if so, whether a class should be certified. To that end, DRI has filed in this Court a substantial number of *amicus* briefs which present the civil defense bar's views and practical perspective on substantive and procedural issues that implicate class-action fairness. For example, DRI's merits-stage *amicus* brief in *Dart Cherokee Basin Operating Co. v. Owens*, No. 13-719 (filed May 29, 2014), argued that there should be no "presumption against removal" under the Class Action Fairness Act ("CAFA")—a position with which the Court agreed. *See Dart Cherokee*, 135 S. Ct. 547, 554 (2014) (holding that "no antiremoval presumption attends cases under CAFA").

DRI also promotes class-action fairness through its Center for Law and Public Policy, whose Class Action Task Force monitors major class actions throughout the United States and when appropriate, recommends legislative and judicial reforms. Through the Center, DRI has submitted written comments and provided oral testimony to Congress about the compelling need to establish and maintain class-action fairness, including with regard to a defendant's right to remove putative interstate class actions from state to federal court. *See, e.g., The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) (statement of John Parker Sweeney, President, DRI–The Voice of the Defense Bar). Along the same lines, DRI has addressed class-action fairness issues by providing written comments and oral testimony to

the Rule 23 Subcommittee of the Advisory Committee on Civil Rules.

* * * * *

The removal-blocking tactic which the Court has agreed to review in this case not only conflicts with the plain text and indisputable purpose of CAFA's expanded diversity jurisdiction removal provision, 28 U.S.C. § 1453(b), but also undermines class-action fairness. CAFA is intended "to ensure that class actions that are truly interstate in character can be heard in federal court," where "such cases properly belong," and thereby eliminate a "parade of abuses" both by "plaintiff-friendly" state courts and the class-action plaintiffs' bar. S. Rep. No. 109-14 ("Senate Report"), at 5, 6, 27 (2005).

In a number of States, however, class counsel have succeeded in circumventing § 1453(b) on the theory that the right to remove an otherwise qualifying interstate class action under § 1453(b) does not extend either to third-party defendants or to additional defendants joined through the filing of a counterclaim. Based on that theory, opportunistic consumer class-action lawyers have recruited individual defendants in carefully selected, seemingly mundane, state-court debt-collection suits to lodge third-party class-action complaints (or class-action counterclaims)—rather than indisputably removable, separate class actions—against previously non-party national corporations such as Petitioner Home Depot here.[2]

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[2] References in this brief to third-party class-action complaints and third-party class-action defendants apply equally to class-

This Court has agreed to review, and hopefully will rectify, this "unfortunate loophole," *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 345 (4th Cir. 2008) (Niemeyer, J., dissenting from the denial of rehearing en banc), which four federal circuits, based on *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941), have read into § 1453(b). *See Palisades*, *supra*; *Tri-State Water Treatment v. Bauer*, 845 F.3d 350 (7th Cir.), *cert. denied*, 137 S. Ct. 2038 (2017); *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d 849 (6th Cir. 2012).

DRI defers to Petitioner's common-sense, plain-text reading of § 1453(b): Under § 1453(b)—which unlike the general removal provision, 28 U.S.C. § 1441(a), broadly refers to "*any* defendant" (emphasis added)—a qualifying class action "may be removed" regardless of whether it is a third-party (or counterclaim) class action. DRI also agrees with Petitioner's discussion regarding why the Court's nearly 80 year-old opinion in *Shamrock Oil*—which only addresses removal by a counterclaim defendant that is the original plaintiff in a state-court suit—does not control. Rather than repeating Petitioner's arguments, this *amicus* brief highlights, from the civil defense bar's perspective, the reasons why excluding a third-party class-action defendant from the statutory right to remove a putative interstate class action under § 1453(b) defeats, rather than promotes, CAFA's overarching objective of class-action fairness.

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action claims filed against additional defendants by means of counterclaims (i.e., "counterclaim class actions").

SUMMARY OF ARGUMENT

This Court explained in *Dart Cherokee* that "CAFA's 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.'" 135 S. Ct. at 554 (quoting S. Rep., *supra* at 43). The CAFA removal provision at issue in this appeal, 28 U.S.C. § 1453(b), expressly authorizes "any defendant" to remove a qualifying class action to federal district court, and thereby avoid state-court class-action abuses. *See* 28 U.S.C. § 1711 note (CAFA § 2(a)(2), (3) & (4), Pub. L. No. 109–2, 119 Stat. 5 (2005)) (describing state-court class-action abuses, including state courts "keeping cases of national importance out of Federal court" and "acting in ways that demonstrate bias against out-of-State defendants"); *see also* S. Rep., *supra* at 10-27 (providing an encyclopedic discussion of state-court class-action abuses).

State-court class-action abuses include, for example, (i) expansive assertion of specific personal jurisdiction over, and hostility toward, out-of-state corporate defendants; (ii) loose interpretation and lax, inconsistent, and/or unpredictable application, of state-court class-action rules; (iii) actual or apparent bias against corporate defendants concerning threshold legal defenses, timing and scope of discovery, class certification, admission of expert testimony, and approval and administration of class settlements; and (iv) limited opportunities for timely and meaningful appellate review.

The lower courts' interpretation of § 1453(b), which deprives third-party class-action defendants of

CAFA's expanded right to remove, is a major impediment to the very type of class-action reform that CAFA was enacted to achieve. Further, although not directly before the Court in this case, the same is true for a corporate defendant which, under a similarly crabbed reading of § 1453(b), cannot remove otherwise qualifying class-action claims because it is the original plaintiff in a debt-collection suit. Allowing class-action plaintiffs' attorneys to sidestep removal, and thereby pursue high-stakes ($5,000,000+) consumer class actions in state trial courts of their choosing, turns the clock back to before CAFA was enacted and obstructs the Act's purpose and operation.

ARGUMENT

Excluding third-party class-action defendants from CAFA's expanded right to remove would perpetuate, or reinstate, state-court class-action abuses

A. Requiring national corporations to litigate, or settle, high-stakes interstate class actions in state courts is incompatible with civil justice

According to the Fourth, Sixth, Seventh, and Ninth Circuits, the class-action plaintiffs' bar can dodge CAFA removal, and pursue national consumer class actions in plaintiff-friendly state courts, by cajoling individual defendants in garden-variety debt collection suits to file third-party class-action complaints against previously non-party corporate defendants.

If the Supreme Court were to green-light this ploy by construing the unambiguous phrase "any defendant" in § 1453(b) to exclude any defendant that is subjected to class-action claims by means of a third-party complaint, a tsunami of interstate class-action litigation would inundate state courts throughout the United States. Allowing those types of class actions to remain in state court would defeat one of CAFA's express purposes: "restor[ing] the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." 28 U.S.C. § 1711 note (CAFA § 2(b)(2), Pub. L. No. 109–2, 119 Stat. 5 (2005)); *see also Palisades Collections LLC v. Shorts*, 552 F.3d at 342 (Niemeyer, J., dissenting) ("CAFA § 2 [Findings and Purposes] addresses the federalism principle, stating that Congress intended the extension of federal jurisdiction over large interstate class actions and liberalization of removal to *further* the proper balance of federalism"); S. Rep., *supra* at 23 (discussing class actions and federalism).

DRI's members have extensive experience attempting to obtain a fair shake for national corporate defendants that are subjected to state-court liability suits—including in plaintiff-friendly jurisdictions where state-court trial judges' electoral campaigns routinely receive substantial financial support from the plaintiffs' bar. *See generally Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1662 (2015) (noting that "[i]n 39 States, voters elect trial or appellate judges at the polls").

The daunting uphill battles that national corporations and their defense counsel encounter on tilted, slippery, state-court playing fields are greatly exacerbated when litigation involves even frivolous class-action allegations. Two of the circuits (Seventh and Ninth) that have interpreted § 1453(b) in a way that precludes class-action defendants from successfully removing third-party complaints to federal district courts encompass some of the nation's worst state-court "judicial hellholes." *See* American Tort Reform Ass'n, *Judicial Hellholes (2017-2018)* (listing California and Madison & Cook Counties, Illinois as among the nation's worst).[3] But the burdens, risks, and injustices suffered by corporations that are compelled to defend or settle class actions in state courts are not limited to the civil-justice-inferno jurisdictions that perenially appear on the judicial hellholes list. The following are some of the formidable challenges that national corporations encounter when subjected to class-action claims in state courts *througout* the United States:

1. All federal district courts are governed by the stringent, detailed, and periodically amended class-action criteria and procedures set forth in Federal Rule of Civil Procedure 23, and by this Court's federal class-action jurisprudence. Each State, however, is free to adopt and interpret its own class-action rules. Although many States have adopted some form of the current version, or an earlier iteration, of Rule 23, there are significant variations among and within state court systems. *See* Thomas

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[3] *Available at* http://www.judicialhellholes.org.

D. Rowe, Jr., *State and Foreign Class-Action Rules and Statutes: Differences From—and Lessons For?—Federal Rule 23*, 35 W. St. U. L. Rev. 101 (2007-2008). For example, Rule 23 of the North Carolina Rules of Civil Procedure—which would apply to the class-action claims in this case if the Fourth Circuit's remand to state court were affirmed—merely consists of four sentences, only two of which are potentially relevant. *See* N.C. R. Civ. P. 23(a) & (c).

Indeed, the law professor who mapped the easy-to-follow CAFA escape route at issue in this appeal acknowledged that Federal Rule of Civil Procedure 23 "differs textually in some important ways from some state class-action rules; and if we also consider the different interpretations that states adopting the text of Federal Rule 23 sometimes give to their own class-action rules, the gulf between state class-action practice and federal class-action practice grows wider." Jay Tidmarsh, *Finding Room for State Class-Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. St. U. L. Rev. 193, 195-96 (2007-2008); *see also* Jay Tidmarsh, *Living in CAFA's World*, 32 Rev. Litig. 691, 693 (2013) (citing the Senate Report "[f]or a description of the generous state-court interpretations of state class action rules[,] laws and usages that motivated Congress to pass CAFA").

2. The Senate Report explains in the section entitled "Purposes" that when class actions are adjudicated in state courts, "the governing rules are applied inconsistently (frequently in a manner that contravenes basic fairness and due process considerations) and . . . there is often inadequate

supervision over litigation procedures and proposed settlements." S. Rep., *supra* at 4; *see also id.* at 14. Moreover, "there appears to be state court provincialism against out-of-state defendants or a judicial failure to recognize the interests of other states in the litigation." *Id.* at 6.

3. According to the Senate Report, one "type of class action abuse that is prevalent in state courts in some localities is the 'I never met a class action I didn't like' approach to class certification," even going so far as to certify classes "that federal courts had already found uncertifiable." *Id.* at 22. "So-called 'drive-by class certification' cases, in which a class is certified before the defendant has a chance to respond to the complaint, or in some cases, has even received the complaint," are among the "most egregious examples" of the "'laissez faire' attitude of some state courts" to class certification. *Id.*

Such a reflexive approach to the granting of class certification—widely viewed as *the* critical event in the life of any class action—is the polar opposite of the "rigorous analysis" that this Court has emphasized a federal district court must conduct to determine whether "the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (internal quotation marks omitted). Since Rule 23(a) "imposes stringent requirements for certification that in practice exclude most claims," *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013), it is not surprising that plaintiffs' attorneys prefer to pursue class-action claims in state courts

that operate under elastic, if not arbitrary, class-certification criteria. Indeed, class-action lawyers in California even have succeeded in circumventing that State's scant class-action provision, Cal. Civ. Proc. Code § 382, for certain state-court representative actions. *See Arias v. Superior Court of San Joaquin Cty.*, 46 Cal.4th 969, 975 (2009) (holding that California class-action requirements "need not be met when an employee's representative action against an employer is seeking civil penalties under the Labor Code Private Attorneys General Act"); *but see Halliwell v. A-T Solutions*, 983 F. Supp. 2d 1179, 1182-84 (S.D. Cal. 2013) (Fed. R. Civ. P. 23 applies when such "PAGA" actions are litigated in federal court).

4. Many state courts do not have a counterpart to Federal Rule of Civil Procedure 23(f), which authorizes federal courts of appeals to permit an interlocutory appeal of "an order granting or denying class-action certification." Some States have adopted a "death knell doctrine" that allows a plaintiff to pursue an immediate appeal of a trial-court order that *terminates* class claims. *See, e.g.*, *In re Baycol Cases I and II*, 51 Cal. 4th 751, 757-60 (2011) (discussing "death knell" doctrine); *Lee v. Dynamex, Inc.*, 166 Cal. App. 4th 1325 (2008) (reversing state trial court order denying class certification). But there may be little, if any, opportunity for a class-action defendant to obtain timely and meaningful interlocutory review of a state-court order *granting* class certification.

5. Corporate defendants are under considerable pressure to settle virtually any class action where

certification has been, or likely is to be, granted. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (quoting *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsberg, J., dissenting)) (acknowledging it is "well known that [class actions] can unfairly '[p]lace pressure on the defendant to settle even unmeritorious claims'")); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 485 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 495 n.9 (Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification).

When state trial courts grant certification, the pressure on corporate defendants to settle untested and often spurious class-action claims is perhaps even greater than in federal court. The "unbounded leverage" that class-action attorneys enjoy in plaintiff-friendly state courts "can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—frivolous lawsuits." S. Rep., *supra* at 20.

To compound such "judicial blackmail," *id.*, "[i]n too many cases, state court judges are readily approving class action settlements that offer little—if any—meaningful recovery to the class members and simply transfer money from corporations to class counsel." *Id.* at 4; *see also id.* at 14 ("[L]awyers, not plaintiffs, may benefit most from settlements . . . the attorneys receive excessive attorneys' fees with

little or no recovery for the class members themselves."); Remarks on Signing the Class Action Fairness Act of 2005, 41 Weekly Comp. Pres. Doc. 265, 266 (Feb. 18, 2005) (prior to CAFA, "[i]n many cases, lawyers went home with huge payouts, while the plaintiffs ended up with coupons worth only a few dollars").

6. The rough justice meted out by state courts to national corporations subjected to class-action claims is not limited to the skewed interpretation and/or freewheeling application of inadequately protective state class-action rules. For example—

- Due process limitations on a state court's exercise of specific personal jurisdiction over class-action defendants that are not "at home" in a forum State remain a matter of controversy. *See, e.g.*, *Bristol-Myers Squibb Co. v. Super. Ct. of Calif.*, 137 S. Ct. 1773, 1789 n.4 (2017) (Sotomayor, J., dissenting) (stating that "[t]he Court today does not confront the question of whether its opinion here would also apply to a class action in which a plaintiff in the forum State seeks to represent a nationwide class"). Lower courts continue to struggle with this important jurisdictional question. *See, e.g.*, *In re: Whole Foods Market Group, Inc.*, No. 18-8006 (D.C. Cir. Oct. 11, 2018) (Order allowing interlocutory appeal regarding applicability of *Bristol-Myers* jurisdictional limits to putative nationwide class).

Even where there are solid threshold grounds for disposing of a putative class action on jurisdictional or justiciability grounds, trial-prone state courts are generally reluctant to grant motions to dismiss or for summary judgment. As a result, once a national

corporation is haled into a state-court class-action proceeding, it most probably is there to stay unless and until it agrees to an exorbitant settlement, or suffers an adverse judgment, destined to enrich class counsel at the expense of class members. *See* S. Rep., *supra* at 14; Competitive Enterprise Inst., Center for Class Action Fairness ("Unfair settlements generally serve self-interested lawyers and third parties at the expense of absent class members, the group of people whose rights are traded away to settle a class action").[4]

- State-court class-action litigation burdens not only are substantial, but also frequently imposed prematurely. To help plaintiffs bolster speculative class-action claims, and perhaps induce early settlement, many state trial courts routinely allow full-blown merits discovery even prior to class certification.

- In the event that a state-court class-action defendant takes the risk of going to trial, *Daubert*-type admissibility standards for expert testimony may not apply.

7. Insofar as CAFA has succeeded in reducing the number of interstate class actions filed, or adjudicated or settled, in state courts, *see* Tidmarsh, *Living in CAFA's World*, *supra* at 693 n.10, achievement of that congressional goal presumably has resulted in state trial courts composed of many judges who have little experience presiding over major class actions. An opinion by this Court authorizing class-action plaintiffs' attorneys to

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[4] *Available at* https://cei.org/issues/class-action-fairness.

engage in the removal-evasion strategy at issue in this appeal would instantaneously reopen the state-court class-action floodgates. That would enable judges, sitting in state trial courts long imbued with pro-plaintiff/anti-corporation bias, to preside over high-stakes interstate class actions in a way that would be even more problematic for civil justice than was the case in 2005 when CAFA was enacted.

B. Court of Appeals decisions narrowly construing § 1453(b) fail to take into account CAFA's objective of removing interstate class actions from the throes of state-court abuses

"CAFA's primary objective [is] ensuring 'Federal court consideration of interstate cases of national importance.'" *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013)) (quoting CAFA § 2(b)(2), Pub. L. 109-2, 119 Stat. 5); *see also Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 165 (2014) (discussing how CAFA "loosened the requirements for diversity jurisdiction for . . . 'class actions'"); S. Rep., *supra* at 5, 30 (CAFA's fundamental purposes include "expanding federal jurisdiction over interstate class actions," which "typically involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit").

The Fourth Circuit acknowledged in its opinion here that "CAFA, and in particular 28 U.S.C. § 1453(b), was adopted to extend removal authority beyond the traditional rules" in order to "curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used

to litigate multi-state or even national class actions in state courts." App. 4a-5a (internal quotation marks omitted). But the court's holding that the broad and unambiguous phrase "any defendant" in § 1453(b) does not really mean what it says ignores that provision's indisputable purpose of removing most class actions from state trial courts, thereby "mak[ing] it harder for plaintiffs' counsel to 'game the system.'" S. Rep., *supra* at 5.

More specifically, the Fourth Circuit adhered to its earlier decision in *Palisades Collections*, which "applied *Shamrock Oil* and held that an additional counter-defendant was not 'the defendant or defendants' because it was not a defendant against whom the original plaintiff asserted a claim." App. 6a (quoting *Palisades Collections*, 552 F.3d at 336).[5] *Shamrock Oil*, however, only addressed the authority of the original plaintiff to remove a breach-of-contract counterclaim under the 1887 predecessor to the current and substantially similar general removal statute, 28 U.S.C. § 1441(a). In holding that the general removal provision's reference to "the defendant or the defendants" does not encompass an *original* counterclaim defendant, the Court in *Shamrock Oil* found "of controlling significance . . . the Congressional purpose *to narrow* the federal jurisdiction on removal" in the 1887 general removal provision compared to its more liberal, 1875 predecessor. *Shamrock Oil*, 313 U.S. at 107 (emphasis added).

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[5] The Fourth Circuit's term "additional counter-defendant" includes third-party class-action defendants as well as class-action counterclaim defendants. *See* App. 5a n.1.

Shamrock Oil does not involve class-action removal: The Court's 1941 holding based on the *narrowing* of the 1887 general removal statute compared to its 1875 predecessor obviously did not address the "*expanded* removal authority *for class actions*," App. 4a (emphasis added), that Congress established in 2005 through enactment of CAFA. *See Palisades Collections*, 552 F.3d at 344 (Niemeyer, J., dissenting) ("Section 1453(b), by authorizing 'any defendant' to remove, makes *Shamrock Oil* inapplicable in the CAFA context . . . ."); *see also* S. Rep., *supra* at 6 (indicating that "the concept of class actions that are a familiar part of today's legal landscape did not arise until 1966"). Nor does *Shamrock Oil* take into account the congressional intent—the objective of avoiding state-court class-action abuses—underlying CAFA's expansion of class-action removal authority for the benefit of "any defendant." Thus, the better reading of § 1453(b) is that *any* class-action "may be removed," regardless of the procedural vehicle through which the class-action is asserted.

Neither the Fourth Circuit panel opinion here, nor that court's majority opinion in *Palisades Collections*, expresses any concern about the practical consequences of its short-sighted § 1453(b) interpretation: Allowing class-action plaintiffs and their lawyers to defeat removal simply by filing third-party class-action complaints would enable them, in concert with plaintiff-friendly state courts, to continue perpetrating the very types of class-action abuses that CAFA was enacted to prevent,

and thereby "subvert the intent of the Act." S. Rep., *supra* at 48.

The other circuit opinions that have addressed the issue are equally myopic.

Consider the Ninth Circuit majority opinion in *Westwood Apex v. Contreras*, 644 F.3d 799 (9th Cir. 2011). According to that opinion, Congress could not have "intended to modify the original defendant rule" ("limiting the right of removal to original defendants") because "there is no mention of '*Shamrock Oil*' or 'third-party' or 'counterclaim defendant' in the entirety of the Senate Report." *Id.* at 806; *see also In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 854 (adopting *Westwood Apex*). Lack of congressional intent should not be inferred, however, merely because the 2005 Senate Report failed to explicitly anticipate the post-CAFA anti-removal tactic at issue. Indeed, in his separate opinion in *Westwood Apex*, Circuit Judge Bybee explained "[i]t is thus counterintuitive that CAFA does not authorize the removal of this suit . . . the removing parties . . . were forced into state court when [the original defendant] transformed a $20,000 debt-collection lawsuit into an unrelated multi-million dollar class action by filing a counterclaim not only against the original plaintiff, but also against the removing parties." *Id.* at 807, 809 (Bybee, J., concurring).

Also consider the Seventh Circuit's 2017 opinion in *Tri-State Water Treatment v. Bauer*, 845 F.3d 350, which like the present case, involves a counterclaim class action against Home Depot. *Tri-State* "began as a simple collection action brought in the Small

Claims Court of Madison County, Illinois." *Id.* at 352. The defendant transformed that collection suit into a "multi-state class action" alleging consumer fraud against the original plaintiff and *additional* defendants, including Home Depot. *Id.* Home Depot removed the case to federal court under § 1453(b). Affirming the district court's remand, the court of appeals stated that although "CAFA made some changes to the removal rules for large, state-law based class actions," keeping the multi-state class action litigation in Madison County, Illinois state court somehow would do the "least damage to . . . litigation efficiency." *Id.* at 354, 355. Oblivious to reality—including the fact that Madison County, Illinois is widely viewed as one of the nation's worst judicial hellholes—the court of appeals disagreed with Home Depot's contention that requiring interstate class-action claims to remain in state court "would re-introduce the forum-shopping CAFA was designed to eliminate." *Id.* at 356.

C. Holding that CAFA's expanded right to remove encompasses third-party class-action defendants will deter proliferation or reinstatement of state-court class-action abuses

Class actions, including those filed in or removed to federal court, continue to be a major burden on American business and industry. A recent survey indicates that—

- Class-action spending continues to rise annually. Companies spent $2.24 billion on class actions in 2017.

- The magnitude of class-action exposure and risk also continues to increase.
- Almost 70% of companies face one or more class actions on a continuing basis.
- Consumer fraud claims remain the second most prevalent type of class action.
- Class-action settlement rates have increased to more than 70%.

Carlton Fields Jorden Burt, P.A., *The 2018 Carlton Fields Class Action Survey* at 1-2 (2018).[6]

Corporate counsel's perceptions of the litigation environment in a State's court system "is likely to impact important business decisions at their companies, such as where to locate and do business." U.S. Chamber Inst. for Legal Reform, 2017 Lawsuit Climate Survey, *Ranking the States – A Survey of the Fairness and Reasonableness of State Liability Systems*, at 3.[7] State courts' treatment of class actions, and state trial judges' impartiality and competence, are among the key factors affecting how corporations view the fairness of a State's litigation environment. *See id. at* 4, 11, 15, 20, 21. Generally improved corporate perceptions of state liability systems in recent years, *see id.* at 3, may be due in part to "the effect of CAFA," since "at least initially . . . federal courts saw a significant uptick in the number of class actions either filed in or removed to

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[6] *Available at* https://classactionsurvey.com.
[7] *Available at* https://tinyurl.com/ybe62obn.

federal court." Tidmarsh, *Living in CAFA's World*, *supra* at 693 n.10.

By reading the phrase "any defendant" in § 1453(b) to exclude third-party class-action defendants, however, the lower courts not only have "exalt[ed] form over substance, and run directly counter to CAFA's primary objective," *Standard Fire Ins. Co. v. Knowles*, 568 U.S. at 595, but also enabled state courts to remain in, or revert to, the pre-CAFA world. This Court can, and should, restore nationwide uniformity, and facilitate CAFA's unequivocal intent, by holding that the phrase "any defendant" in § 1453(b) includes third-party class-action defendants.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL CONSUMER LAW CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The National Consumer Law Center ("NCLC") is recognized nationally as an expert in consumer credit issues. For nearly 50 years it has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. It publishes a twenty-volume Consumer Credit and Sales Legal Practice Series, including Consumer Class Action, (9th Ed. 2016), Repossessions (9th Ed. 2017), Fair Debt Collection (9th Ed. 2018), and Unfair and Deceptive Acts and Practices (9th Ed. 2016). A major focus of NCLC's work is to increase public awareness of unfair and deceptive practices perpetrated against low-income and elderly consumers and to promote protections against such practices, and for this reason it has an interest in seeking strong and effective enforcement of consumer protection laws and insuring equal access to justice. NCLC frequently appears as amicus curiae in consumer law cases before trial.

Amicus is concerned that Petitioner Home Depot's proposed interpretation of the removal statutes, if adopted, would radically upset decades of precedent on the standards for removal and impair the ability of consumers to seek fair and meaningful relief.

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[1] Pursuant to Rule 37.3, all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This case raises a narrow, atypical issue: whether a third-party counter-defendant may remove a case to federal court under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), notwithstanding that the federal court lacked subject matter jurisdiction over the original parties.

Amicus agrees fully with Respondent Jackson's legal analysis, but respectfully notes that the factual record in this matter is somewhat limited. Accordingly, Amicus writes separately to provide the Court representative examples of fact patterns under which a counter-defendant would attempt to remove a case under CAFA. As explained more fully below, such cases generally arise when the target of a state-court debt collection action counterclaims that the underlying debt is invalid under state law.

Home Depot and its amici argue that class action counterclaims raised in state court are a form of jurisdictional gamesmanship. They are wrong. As this brief explains, class action counterclaims arise in debt collection actions to dispute the merits of the debt itself, frequently alleging an underlying coordinated scam between various counter-defendants. Such claims are intertwined with the merits of the debt collection action, seeking to remedy actual harms related to the debt. And often these are claims that the claimant must raise or else risk losing the right to pursue altogether.

This brief also explains that third-party counter defendants are not strangers to the initial action. To the contrary, their conduct is inextricably bound

with the original state-court plaintiff's legal action. When one party avails itself of state court in an effort to collect another party's fraudulent debt, it is not unreasonable to expect the later to answer the charge that its debt is unlawful in that same forum.

Amicus respectfully stresses that Home Depot and its amici not only seek to change the way removal jurisdiction has worked in a radical manner, but to do so in a way that would impact the ability of consumers to raise meritorious counterclaims in an efficient and fair manner. Accordingly, Amicus asks this Court to affirm the Fourth Circuit and preserve the decades-long status quo.

ARGUMENT

I. HOME DEPOT IS INCORRECT TO ALLEGE FORUM SHOPPING

Home Depot and its amici argue that the Fourth Circuit should be reversed to prevent forum shopping. Pet. Br. 41, 45; Br. for Retail Litig. Ctr., Inc., *et al.* as Amici Curiae at 5, 11, 21–22; Br. for Wash. Legal Foundation, *et al.* as Amici Curiae at 14 n.5, 30. They contend that preventing a counterclaim defendant from removing a class action will encourage plaintiffs and their attorneys to seek out state-court actions to turn into loosely-related class cases that would otherwise belong in federal court. In other words, Home Depot believes that a consumer will intentionally default on debt and hope to be sued in state court so that she can file a surprise class claim. And attorneys apparently will scour state dockets in search of improper class opportunities. This is a grim—and absurd—vision.

Federal courts have prohibited counter-defendants from availing themselves of removal jurisdiction for decades, yet state court class action counterclaims are infrequent. And these cases are not the result of forum shopping. They appear to arise only when both: (1) class counterclaims are related directly to the initial claim; and (2) consumers are attempting to redress genuine harm perpetrated by multiple parties, including the original plaintiff.

A. Despite the growth in debt collection lawsuits, counterclaim class actions are rare.

Over the last few decades, the debt collection industry has grown significantly. Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 Harv. L. & Pol'y Rev. 91, 94 (2017). The dramatic rise in consumer debt sparked a rise in the third-party debt collection industry. *Id.* Brokers buy and sell delinquent debt in consolidated portfolios and hire collection agencies or law firms to seek to collect on these debts. *Id.* at 96–98. Litigation is an integral part of this industry, and "[d]ebt buyers file hundreds of thousands" of debt collection lawsuits against defaulted borrowers in state court each year. *Id.* at 98. For example, in 2010, one debt buyer filed more than 517,000 collection lawsuits against consumers in state courts. *Id.*

While debt buyers now file many hundreds of thousands of lawsuits each year, class counterclaims to these lawsuits remain rare. For example, if one searches the nation's state courts for "counterclaim

/10 class" on Westlaw, he receives only 507 results, a significant number of which involve counterclaims to plaintiff-initiated class cases. Home Depot's hypothesis that consumers are attempting to manipulate jurisdiction is belied by this reality.

B. When a defendant asserts class counterclaims, they vindicate actual harms that are closely related to the merits of the initial action.

Class counterclaims are uncommon in state court and primarily arise in two factual scenarios. First, they arise when the defendant in a collection action contends that she is the victim of a multiparty, coordinated scam involving a financed consumer transaction.[2] In such cases, a party (usually a lender or some assignee thereof) files a debt collection action against a consumer-defendant in state court, and the consumer raises a class counterclaim challenging the validity of the debt or legality of the underlying consumer transaction. When the consumer files that counterclaim, she names any additional parties responsible for the allegedly fraudulent debt as counter-defendants. This is the fact pattern that gave rise to the case before the Court; i.e., Jackson added counter-defendants because he alleges that they fraudulently created his debt.

Second, class counterclaims also arise when a consumer claims that two coordinated entities have

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[2] Transactions for consumer goods are typically financed in the form of installment payments that consist of both principal and interest.

conspired to violate the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"). In these cases, a party (usually a lender or debt collector), with the help of counsel, files a suit against an individual in state court to collect on an alleged debt. The defendant, disputing that the debt is owed, then asserts class counterclaims against the plaintiff and its counsel for violations of both state law and the FDCPA.

In both of the above fact patterns, class counterclaims are intertwined closely with the merits of the underlying debt collection action, and those class claims seek to redress real harm from coordinated, multi-party deceptive conduct.

1. In cases such as the instant action, a consumer participates in an allegedly wrongful financed consumer transaction. Jackson, for example, alleges that the original plaintiff and two third-party counter defendants were engaged in a scheme to collect an invalid debt, incurred only because the counter defendants violated North Carolina law.

Another example is *United Consumer Fin. Servs. Co. v. Carbo*, 982 A.2d 7 (N.J. Super. Ct. App. Div. 2009) (*"Carbo III"*). In this case, William Carbo purchased a vacuum cleaner from a door-to-door salesman under an installment contract. *Id.* at 13. He executed the contract with a distributor, A & M Merchandizing, Inc. The distributor assigned the contract to United Consumer Financial Services ("UCFS"), which later filed a state collection action against Carbo to collect money Carbo allegedly owed for the vacuum cleaner. *See United Consumer Fin. Servs. Co. v. Carbo*, No. L-3438-02, 2007 WL

1658478 (N.J. Super. Ct. Law Div. May 30, 2007), *aff'd in part, rev'd in part by Carbo III*, 982 A.2d 7 (*"Carbo II"*).

Carbo ultimately responded by filing class counterclaims against UCFS and third-party class claims against A & M. In particular, he alleged that the underlying sales contract was unlawful and deceptive under New Jersey state law and asked the court to void his contract. *Carbo III*, 982 A.2d at 14; *United Consumer Fin. Servs. Co. v. Carbo*, No. L-3438-02, 2007 WL 954016 (N.J. Super. Ct. Law Div. Mar. 9, 2007) (*"Carbo I"*). Carbo also sought to represent a class of consumers, all of whom bought vacuums under this same form contract. The court certified a class, found that the contract violated New Jersey law, and awarded statutory damages to the class. *Carbo III*, 982 A.2d at 15–16, 22–23.

In *Carbo*, as in this case, a consumer defendant to a collection action brought counterclaims to demonstrate that the underlying consumer transaction was invalid under state law. Mr. Carbo *had to raise those arguments in his counterclaim*; had he done otherwise, he would have risked waiving his state law argument entirely. *See Schweizer v. MacPhee*, 325 A.2d 828, 830 (N.J. Super. Ct. App. Div. 1974); N.J. Ct. R. R. 4:7-1 ("A defendant, however, either failing to comply with R. 4:30A (entire controversy doctrine) . . . shall thereafter be precluded from bringing any action for such claim or for such debt or demand which might have been so set off.").

A & M repeatedly attempted to argue to the trial court—and on appeal—that it should not be a

counter-defendant to Carbo's class action claims. *Carbo III*, 982 A.2d at 15. But the courts uniformly rejected this argument, noting that A & M and UCFS worked closely together to craft and execute the underlying contract. *Id.* Indeed, UCFS prescribed specific form contracts for distributors (including A & M) and gave distributors a manual including guidance about the contracts. *Id.* at 14–15. And because UCFS and A & M were so closely intertwined, they were jointly and severally liable for the underlying deceptive conduct regarding the form contract that gave rise to the alleged debt. *Id.*

2. The second fact pattern that can occasionally lead to class counterclaims occurs when a consumer responds to a collection action by challenging the collection itself. In such cases, the consumer will sometimes join an additional counter-defendant and allege that the initial plaintiff and new counter-defendant conspired to violate both the FDCPA and state law. Indeed, the initial state court action is itself sometimes the event that gives rise to a claim under the FDCPA (claims that a defendant must bring or risk waiving).[3]

This was the case in *Taylor v. First Resolution Inv. Corp.*, 72 N.E.3d 573 (2016), *cert. denied sub nom. First Resolution Inv. Corp. v. Taylor-Jarvis*, 137 S. Ct. 398 (2016). This case began when Sandra J. Taylor Jarvis defaulted on certain debt in 2004. *Id.* at 582. The bank to whom she owed that debt

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[3] It is not unfair—much less "gamesmanship"—for parties to remain in state court to answer the counterclaim alleging that one of those parties filed the initial state court lawsuit wrongfully.

sold the debt to another entity, which, in turn, later sold those rights to First Resolution Investment Corp. ("FRIC"). *Id.* In November 2009, a law firm called Cheek Law Offices ("Cheek") sent Taylor Jarvis a letter informing her that she owed FRIC a massive debt. *Id.* Four months later, FRIC (through Cheek) filed a collection action in Ohio state court seeking, among other things "future interest of 24 percent," and obtained a default judgment for the same. *Id.*

The state court later vacated the default judgment. *See id.* at 582–83. When Taylor Jarvis answered FRIC's complaint, she asserted class-action counterclaims against both FRIC and Cheek. In particular, she contended that when FRIC and Cheek attempted to collect a time-barred debt for an interest rate that would have been impermissible even had the debt not been time-barred, FRIC & Cheek violated both Ohio and federal law. *Id.*

FRIC dismissed its collection complaint against Taylor Jarvis without prejudice, and thereafter the trial court realigned the parties and granted summary judgment to FRIC. *Id.* at 583–84. Taylor Jarvis ultimately persuaded the Ohio Supreme Court to consider her case.

On appeal, the Ohio Supreme Court noted that this case raised issues that were "endemic to the whole debt collection world" and of great interest to the state. *Id.* at 581. Today, debt collection revolves around the common practices of buying and selling debt. Debts are bundled and sold at high volume in portfolios for cents on the dollar. *Id.* at 578–79; *see also Improving Relief from Abusive Debt Collection*

Practices, 127 Harv. L. Rev. 1447, 1448 & n.6 (2014). The Ohio Supreme Court observed that because debt is sold in such high-volume, debt buyers frequently do "not receive any documents at the time of purchase" for most of the debt that they are purchasing. *Taylor*, 72 N.E.3d at 579 (quoting *Improving Relief*, 127 Harv. L. Rev. at 1449). It found that "[a] predictable result of debt buyers filing a high volume of lawsuits based on imperfect information is that lawsuits are regularly filed after the right to collect debts has expired or that seek to collect a debt that is not owed; *each year, buyers sought to collect about one million debts that consumers asserted they did not owe.*" *Id.* (emphasis added) (citation omitted).[4] It reversed summary judgment, noting, among other things, that FRIC and Cheek obtained a default judgment awarding interest at a rate six-times the statutory rate. *Id.* at 596.

Put simply, Taylor Jarvis brought legitimate class counterclaims in response to a collection action in which she alleged that action itself was illegitimate. Home Depot's suggestion that someone like Taylor Jarvis is lying in wait for many years, hoping that an unsuspecting company will file a wrongful action against her, should be rejected out of

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[4] The problems endemic to the debt collection industry are compounded by that industry's reliance on default judgment: "[e]mpirical evidence shows that many debt buyers using a high volume of lawsuits as a component of their recovery strategy rely heavily on the assumption that consumers often fail to show up to contest the case . . . ." *Improving Relief*, 127 Harv. L. Rev. at 1449. "In 2010, the FTC reported that rates of default judgments in debt collection cases ranged from sixty to ninety-five percet [sic]." Stifler, 11 Harv. L. & Pol'y Rev. at 108.

hand. And while class counterclaims are very rare, FDCPA and state consumer protection statute claims make up a substantial portion of the state court collection-action class counterclaims. *See, e.g.*, *EMCC Invest. Ventures v. Rowe*, 2011-P-0053, 2012 WL 4481332, at *1 (Ohio Ct. App. Sept. 28, 2012); *Liberty Credit Servs. Assignee v. Yonker*, 2012-P-0096, 2013 WL 5221219, at *1 (Ohio Ct. App. Sept. 16, 2013); *HBLC, Inc. v. Egan*, 50 N.E.3d 1185, 1188 (Ill. App. Ct. 2016); *Midland Funding, L.L.C. v. Hottenroth*, 26 N.E.3d 269, 273 (Ohio Ct. App. 2014). In *EMCC Invest. Ventures v. Rowe*, 2011-P-0053, 2012 WL 4481332, at *1 (Ohio Ct. App. Sept. 28, 2012).

C. Holding additional counterclaim defendants to their co-party's choice of forum further principles of substantial justice.

While removal jurisdiction is a matter of statutory interpretation, this Court has noted that holding plaintiffs to their initial choice of forum is also consistent with fundamental principles of fairness:

> In the case before us, . . . citizens of Ohio, voluntarily resorted, as plaintiffs, to the State court of Indiana. They were bound to Know of what rights the defendants to their suit might avail themselves under the code. Submitting themselves to the jurisdiction they submitted themselves to it in its whole extent. The filing of the new paragraphs, therefore, could not make them defendants

> to a suit, removable on their application to the Circuit Court of the United States.

West v. Aurora City, 73 U.S. 139, 142 (1867).

Home Depot challenges this type of analysis, arguing that, as an additional counterclaim defendant, it has been unfairly and unwittingly dragged into the state court forum. Pet. Br. at 44–45. This is inaccurate—Home Depot was no innocent bystander—for the reasons well-explained in Jackson's brief. Resp. Br. at 2–5, 53–54. And this principle holds even more strongly in the FDCPA cases discussed above. In such cases, the additional counterclaim defendant is often the counsel who filed the collection action in state court in the first instance, and the lawsuit frequently exists *solely* because of that state court action. *See Taylor*, 72 N.E.3d at 598 (counterclaims against debt collector and counsel for filing suit to collect on time-barred debt and at excessive interest rate); *HBLC, Inc. v. Egan*, 50 N.E.3d 1185, 1188 (Ill. App. Ct. 2016) (counterclaims against debt collector and counsel for filing suit to collect on time-barred debt); *Midland Funding, L.L.C. v. Hottenroth*, 26 N.E.3d 269, 273 (Ohio Ct. App. 2014) (same).

Liberty Credit Servs. Assignee v. Yonker is instructive. 2012-P-0096, 2013 WL 5221219, at *1 (Ohio Ct. App. Sept. 16, 2013). In that case, Liberty (which purchased allegedly delinquent debt) filed a collection action in Ohio municipal court. The ostensible debtor denied that he owed the debt and asserted various counterclaims, including those contending that Liberty *and its counsel* had wrongfully filed the lawsuit against him. Liberty's

counsel then attempted to remove the case to federal court, notwithstanding that "Liberty and [its counsel] chose to file an action in the municipal court." *Id.* at *5. Indeed, the state court chastised Liberty and its counsel for *their* forum shopping. *Id.* at *5–6.

In sum, counter to Home Depot's assertion, the principles articulated in *West* are consistent with fundamental fairness in this case and the rare cases that are similar to it.[5]

II. CONSPIRATORS SHOULD NOT HAVE TWO OPPORTUNITIES TO CHOOSE FEDERAL OR STATE JURISDICTION

Courts hold unanimously that "removal is not available for a plaintiff who is a counterclaim-defendant." *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 354 (7th Cir. 2017). This is consistent with the principle that the federal basis for removal must be based solely on the allegations in the plaintiff's complaint. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002); *Capital One Bank (USA), N.A. v. Deane*, 3:12CV1544 (JBA), 2013 WL 12284471, at *2 (D. Conn. June 14, 2013). In other words, a defendant cannot create removal jurisdiction by adding a federal counterclaim.

Home Depot and its amici, however, would create a rule in which co-conspirators have *two* chances to

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[5] It bears emphasis that Congress has never attempted to overrule the principles announced many years ago in *West* and *Shamrock Oil*.

choose the forum, yet the consumer victim has none. Amicus asks this Court not to endorse such an inequitable result against the unanimous weight of precedent and straightforward language of the statute, well-analyzed by Respondent.

CONCLUSION

Amicus respectfully asks this Court to affirm the opinion of the United States Court of Appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED,

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17-1471

IN THE

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GEORGE W. JACKSON,
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On Writ of Certiorari
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BRIEF FOR *AMICI CURIAE* RETAIL LITIGATION CENTER, INC., CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") represents national and regional retailers, including many of the country's largest and most innovative retailers. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers courts retail-industry perspectives on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has participated as *amicus curiae* in more than 100 cases.

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the nation. An important function of the Chamber is to advocate for its members' interests before Congress, the executive branch, and the courts.

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit professional association of

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[1] On November 5, 2018, *amici* notified the parties of their intention to file this brief. Both parties have consented to the filing of this brief. *Amici* affirm that no counsel for a party wrote this brief in whole or in part, and no counsel or party, or any other person other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the brief's preparation or submission.

corporate members representing a broad cross-section of more than 80 American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, in support of its members and presenting the broad perspective of product manufacturers and seeking fairness and balance in the application and development of the law as it affects product risk management.

The foregoing *amici* each regularly file *amicus* briefs in cases raising issues of vital importance to the business community. This is such a case. *Amici*'s members frequently face large interstate lawsuits, class action lawsuits, and multidistrict litigations. They have a keen interest in ensuring that courts fairly apply the rules governing removal of such actions to federal court.

The ruling below extends *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100 (1941) far beyond its rationale to bar removal by third-party counterclaim defendants who had no role in choosing the forum of the original claim.

The decision below also threatens the robust protections afforded by the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.). It ignores Congress's practical legislative solution to state court class action abuses and instead applies an overly restrictive reading of this Court's decision in *Shamrock Oil*, which pre-dates CAFA by over 75 years.

In enacting CAFA, Congress expanded federal court jurisdiction over class actions and—critically here—made removal more broadly available. Since CAFA's enactment, *amici*'s members have come to rely on CAFA in general and the removal provisions in particular to avoid many of the abusive practices that plagued state court class action litigation.

The Fourth Circuit's restrictive view of removal will harm businesses across the country. With little extra effort, plaintiffs can now file their class claims as third-party counterclaims in the state courts of their choice, with no fear of triggering CAFA. Inevitably, an increasing number of *amici*'s members will be trapped in the same state court systems that Congress deemed unsuitable for large class actions. *Amici* and their members therefore have a strong interest in this case.

SUMMARY OF ARGUMENT

Amici fully endorse Petitioner's legal analysis of the two questions presented. The Fourth Circuit erred

in concluding that the original-plaintiff rule[2] bars removal by third-party counterclaim defendants. And it further erred holding that *Shamrock Oil*'s original-plaintiff rule supersedes CAFA's removal provisions.

Amici write separately to provide helpful context for the Court's decision. First, *amici* explain why the third-party defendant question matters to its members. Second, *amici* offer a historical perspective on the CAFA success story. We detail the rise of class action abuses and the sustained congressional effort required to pass the act. Throughout, *amici* highlight the importance of these improvements to large national corporations like those that comprise its respective memberships.

First, *Shamrock Oil* should not extend to third-party counterclaim defendants. Such parties have no say in the original choice of forum and thus should not remain locked into a state forum of their opponent's choosing.

This issue is particularly important to *amici* and their members because the flawed extension of *Shamrock Oil* will keep related cases outside of the federal multidistrict ligation system. As a result, individual plaintiffs' procedural gamesmanship will undermine the MDL statute's twin goals of nationwide consistency and fairness. This Court should accordingly

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[2] Although some of the cases refer to an "original defendant rule," *e.g. Westwood Apex v. Contreras*, 644 F.3d 799, 807-08 (9th Cir. 2011) (Bybee, J., concurring), we agree with Petitioner's brief that, for the reasons stated therein, *Shamrock Oil*'s holding is more properly viewed as an "original-plaintiff rule." Pet'r Br. 16-17.

hold that *Shamrock Oil*'s original-plaintiff rule does not extend to third-party complaints.

Second, defendants should not be permitted to weaponize *Shamrock Oil* to undo the hard-won improvements realized when Congress enacted CAFA. In 2005, the Class Action Fairness Act promised nothing less than a wholesale reform of American class action litigation. Congress made several substantive changes to eliminate the most abusive practices plaguing class actions across the country. And to ensure the widest reach of the new rules to large interstate class actions, Congress added procedural reforms expanding jurisdiction and removal. No longer could plaintiffs' lawyers stack the deck in their favor by steering large class cases into friendly state-court venues.

CAFA has largely achieved its goals. The act has extinguished many of the most egregious class action practices. Yet the Fourth Circuit's decision below threatens this progress. The justices of the *Shamrock Oil* Court never could have foreseen either the coming class action explosion or the eight-year congressional effort culminating in CAFA. Nor could they have foreseen how plaintiffs' lawyers would seize on their ruling prohibiting one type of forum shopping to launch a renaissance in class action-related forum shopping.

Shamrock Oil should not serve as a tool to defeat CAFA. This Court should hold that where a counterclaim defendant otherwise satisfies CAFA's

removal and jurisdiction requirements, *Shamrock Oil*'s original-plaintiff rule does not bar removal.

ARGUMENT

I. *Shamrock Oil* Should Not Extend to Third-Party Counterclaim Defendants.

This Court has directed the parties to address whether *Shamrock Oil* should extend to third-party counterclaim defendants. It should not.

A. The Rationale Underlying *Shamrock Oil*'s Original-Plaintiff Rule Does Not Apply to Third-Party Counterclaim Defendants.

In the language of the playground, *Shamrock Oil* imposed a procedural "no takebacks" rule. The plaintiff must "abide his selection of a forum," even if the original defendant countersues. 313 U.S. at 106 n.2, 107. This straightforward and sensible rule firmly limits plaintiff forum-shopping.

This rationale does not apply, however, to third-party counterclaim defendants. By definition, such parties remained uninvolved in the litigation until an original defendant sued them. They had no role in selecting the forum. Extending *Shamrock Oil* to third-party counterclaim defendants forces them to abide by the forum selection made by their opponent, the class action counterclaim plaintiff. That hardly seems fair.

Nevertheless, ignoring *Shamrock Oil*'s rationale, several courts of appeal force third-party counterclaim

defendants to live with their opponents' choice of forum. But these courts have uncritically extended the original-plaintiff rule without much reasoning. *See* App. to Pet. Cert. 9a ("We hold that the Supreme Court has not called into question *Palisades*' conclusion that an additional counter-defendant is not entitled to remove under § 1441(a) or § 1453(b)"); *Tri-State Water Treatment, Inc. v. Bauer*, 845 F.3d 350, 354 (7th Cir. 2017), *cert. denied*, 137 S. Ct. 2138 (2017) ("All we know from *Shamrock Oil* is that removal is not available for a plaintiff who is a counterclaim-defendant."); *In re Mortg. Elec. Registration Sys.*, 680 F.3d 849, 853 (6th Cir. 2012) (citing *Shamrock Oil* for the proposition that a "third-party defendant is not a 'defendant' who may remove the action to federal court"); *Westwood Apex*, 644 F.3d at 804 ("Since the Supreme Court's decision in *Shamrock Oil* . . . 'defendant' in Chapter 89, thereby, excludes plaintiffs and non-plaintiff parties who become defendants through a counterclaim."); *Palisades Collection LLC v. Shorts*, 552 F.3d 327, 332 (4th Cir. 2008) ("For more than fifty years, courts applying *Shamrock Oil* have consistently refused to grant removal power under § 1441(a) to third-party defendants[.]").

This Court should clarify that *Shamrock Oil*'s original-plaintiff rule does not extend beyond its logical bounds. That rule should not bar parties brought into the case for the first time as third-party defendants from removing to federal court.

B. Extending *Shamrock Oil* to Third-Party Counterclaim Defendants Would Frustrate the Federal Multidistrict Litigation System.

This issue has great significance to *amici*, both within and outside the class context, particularly because of the rise of the multidistrict-litigation ("MDL") system as a means of achieving fairness and consistency. Plaintiffs' approach would open a gaping hole in that system.

No procedural device allows litigants to combine or otherwise formally coordinate overlapping or related cases that are simultaneously pending in different state courts. As a result, state courts throughout the country may expend significant judicial resources only to reach inconsistent outcomes, with implications reaching beyond each state's boundaries.

The risk of inconsistent judgments from different state courts—particularly inconsistent injunctive or prospective relief—poses a serious problem for *amici*'s members. Large national companies facing conflicting judgments may find full compliance difficult if not impossible. The federal courts, meanwhile, have found a solution to this problem.

In 1968, Congress created the multidistrict litigation device and, to administer it, the United States Judicial Panel on Multidistrict Litigation ("MDL Panel"). *See* 28 U.S.C. §1407. The MDL panel has the power to consolidate and transfer "civil actions involving one or more common questions of fact [that] are pending in different [federal] districts" if such a

transfer "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *Id.* at § 1407(a). As the MDL panel explains, "[t]he purposes of this transfer or 'centralization' process are to avoid duplication of discovery, to prevent inconsistent pretrial rulings, and to conserve the resources of the parties, their counsel and the judiciary." *Overview*, UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, https://tinyurl.com/JPMLOverview (last visited November 12, 2018).

"Since its inception, the Panel has considered motions for centralization in more than 2,750 dockets involving over 600,000 cases and millions of claims therein." *Id.* These cases "encompass litigation categories as diverse as airplane crashes; other single accidents, such as train wrecks or hotel fires; mass torts, such as those involving asbestos, drugs and other products liability cases; marketing and sales practices; patent validity and infringement; antitrust price fixing; data security breaches, securities fraud; and employment practices." *Id.*

Such centralization is key because, as federal and state judicial bodies have recognized, "litigating similar cases in multiple jurisdictions can strain the resources of the parties and result in unnecessary duplication of effort and considerable inefficiencies." Federal Judicial Center, National Center for State Courts, and United States Judicial Panel on Multidistrict Litigation, *Coordinating Multijurisdictional Litigation: A Pocket Guide for Judges*, MULTIDISTRICT LITIGATION at 2 (2013)

https://tinyurl.com/MDLPocketGuide. "Moreover, the decisions or actions of a single court can significantly affect cases pending in other jurisdictions, sometimes to the detriment of the parties' interests and the fairness of the overall resolution." *Id.*

The MDL panel assigns the cases to the district and judge it considers "best situated to handle the transferred matters," based on "the unique circumstances that each [consolidation] motion presents." Judge John G. Heyburn II, *A View From the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, 2228 (2008). In fact, "[f]inding the best district for centralization and identifying the best district judge . . . is often the most difficult decision the Panel faces." *Id.* at 2239.

This assignment function is carried out by the MDL Panel of seven "seasoned and attentive" federal judges, *id.* at 2236, and ensures that large and complex cases proceed in the best possible forum for their effective resolution, neutralizing the vagaries of a plaintiff's forum selection in cases that carry national implications. The MDL Panel thus brings expertise and deliberateness to the management of large, recurring matters that require a uniform solution.

Growing in reach and influence, MDLs now serve as a core tool in the federal judiciary's toolkit. As Judge Heyburn, former MDL panel chair, explains, "[a]s the class action mechanism has evolved and, to some extent, become less available or desirable, some litigants may be turning to the MDL processes as a way

of achieving some of the benefits or advantages formerly available under Rule 23." *Id.* at 2232. As a result, "over the past two decades, the Panel's role in helping manage not only putative class actions but also other complex cases seems to have grown steadily." *Id.* at 2232-33.

Plaintiffs' lawyers frustrate the MDL system's benefits, however, with procedural gambits that needlessly lock related cases in state court, such as the third-party counterclaim maneuver Respondent used below. A new third-party action may well mirror the dozens, hundreds, or even thousands of related cases proceeding simultaneously in a federal MDL. A third-party counterclaim defendant may, in fact, already be a party to such an MDL through other cases. Yet extending *Shamrock Oil* to third-party counterclaim defendants places that MDL out of reach. This result defies all good sense, squandering the resources of both federal and state courts, and amplifying the risk of inconsistent outcomes on matters of large-scale importance.

Amici urge this Court to clarify that the original-plaintiff rule does not extend to parties added to ongoing litigation as third party defendants. Instead, the ordinary removal and jurisdiction rules should apply in such cases, as if the third-party action were the original action. *Amici* believe, on behalf of their members who regularly participate in interstate litigation of national consequence, that procedural gamesmanship by individual plaintiffs should not close the federal courthouse doors.

II. The Decision Below Undermines Congress's Considered and Bipartisan Effort to Curtail Class Action Abuse in State Courts Though CAFA.

This case also asks whether a non-plaintiff original class action defendant may remove to federal court under CAFA if the class action began as a counterclaim against a co-defendant. In other words, does *Shamrock Oil* create an escape hatch for plaintiffs to avoid CAFA's protections for defendants and class members? *Amici* believe that it does not, because *Shamrock Oil*, like CAFA, aims to prevent unfair forum shopping. *Shamrock Oil*'s original-plaintiff rule should not gut CAFA's keystone protection: the right of defendants to remove qualifying class actions to federal court.

In 2005, after years of bipartisan effort, Congress passed and President Bush signed the Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat 4 (codified as amended in scattered sections of 28 U.S.C.). This landmark statute focused on ending class action abuse. Before CAFA, plaintiffs' lawyers could use just a single diversity-defeating plaintiff to bring interstate class actions involving tens or even hundreds of millions of dollars in a select number of state courts that came to be known as "'magnet' jurisdictions." Class Action Fairness Act of 2005, S. Rep. No. 109-14, at 13 (2005). These plaintiff-friendly jurisdictions attracted class actions because they tolerated or even encouraged numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class

settlements primarily benefitting plaintiffs' lawyers. *Id.* at 13-23. With incomplete diversity and no federal questions, defendants found themselves trapped. CAFA changed all that by granting federal courts jurisdiction over most large interstate class actions.

Thanks to CAFA, major class actions have largely moved from state to federal court. *See* Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1754 (2008) (pointing to "support for the conclusion that the federal courts have seen an increase in diversity removals"); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1610 (2008) ("CAFA has increased . . . the number of class action removals to federal court[.]").

A product of countless hours of congressional fact-finding, deliberation, and negotiation, CAFA succeeded in curtailing some of the worst class action abuses. But as the decision below illustrates, state courts still exert a strong magnetic pull, and the plaintiffs' bar does not give up so easily.

The procedural tactic blessed below allows an end-run around CAFA's core procedural safeguards. It forces defendants to litigate massive class actions in the very same "magnet jurisdictions" that prompted Congress to enact CAFA in the first place. This Court should correct the Fourth Circuit's misapplication of the original-plaintiff rule and protect Congress's carefully designed class action system.

A. CAFA Resulted From Considerable Congressional Effort to Address Class Action Abuses.

To determine how CAFA and the 1941 *Shamrock Oil* decision interact, the Court should consider the significant effort it took to pass this landmark statute.

CAFA resulted from a "grinding eight-year effort" to fix the abuses plaguing state court class actions. Edward Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1823 (2008); *see also* S. Rep. 109-14 (2005); Anna Andreeva, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 U. MIAMI L. REV. 385 (2005).

Passing CAFA required an exceedingly rare level of persistence and, ultimately, bipartisan cooperation. Before reaching agreement in 2005, Congress considered—and failed to pass—no fewer than four bills aimed at addressing class action abuses: the Interstate Class Action Jurisdiction Act of 1999, 106 Bill Tracking H.R. 1875 (passed by the House but not considered by the Senate); the Class Action Fairness Act of 2002, 148 Cong. Rec. H847 (daily ed. March 13, 2002) (passed by the House but not voted on by the Senate); the Class Action Fairness Act of 2003, 108 Bill Tracking H.R. 1115 (passed by the House, but due to a filibuster, was not voted on by the Senate); and the Class Action Fairness Act of 2004, 108 Bill Tracking S. 2062, (stalled in the Senate, not voted on in the House). Andreeva, 59 U. MIAMI L. REV. at 387-88.

Along the way, both the House and Senate held numerous committee hearings. The deliberations produced "multiple reports by both Houses, political compromises, . . . two unsuccessful attempts to terminate debate in the Senate by imposing cloture [on bills with bipartisan support,] and strenuous efforts to amend in both the House and Senate when the bill came to the floor for a final vote." Purcell, 156 U. PA. L. REV. at 1823.

As this persistence shows, widespread class action abuses in state courts strongly motivated Congress to act. Indeed, CAFA's "findings and purposes" section explains that class action abuses had: "(A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for our judicial system." CAFA § 2(a)(2) (codified at 28 U.S.C. § 1711 notes). In particular, Congress called foul on settlements primarily enriching class counsel at the expense of class members who "often receive little or no benefit from class actions, and are sometimes harmed . . . ." CAFA § 2(a)(3) (codified at 28 U.S.C. § 1711 notes). Congress also highlighted settlements unfairly distributed among class members, and notice schemes "that prevented class members from being able to fully understand and effectively exercise their rights." *Id.*; *see also* Purcell, 156 U. PA. L. REV. at 1851-56; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 743-44 (2013).

Congress's concerns about these abuses all focused on fairness to the particular litigants in class

actions. But a state-court driven class action system can create wider, more systemic problems across the economy. Interstate commerce suffers when multiple overlapping class actions pending in different state courts threaten inconsistent judgments.

The American Bar Association Task Force on Class Action Legislation recognized the national threat that inconsistent state judgments pose. *See Report of the ABA Task Force on Class Action Legislation* (2003), https://tinyurl.com/ABATaskForce. "The Task Force early on identified the filing of multiple class actions on the same matters resulting in the pendency of overlapping or competing class actions in a number of courts as one of the most serious concerns with class action practice." *Id.* at 3. The ABA report explained that "[s]uch overlapping class actions consume unnecessary litigation resources, encourage 'gaming' of court filings, and risk inconsistent treatment of like cases." *Id.* This has "result[ed] in [state] courts adjudicating cases that have a nationwide impact despite possibly small interest of the forum state in the suit." *Id.* at 4.

Shortly before CAFA passed, Professor James Underwood highlighted the problems that result from adjudicating cases with nationwide impact in remote state courts. He observed that "principles of federalism have been turned on their heads under the current jurisprudential system that permits (and in some sense requires) locally-elected state court judges to adjudicate the claims of absent nonresident class members against nonresident businesses involving causes of action that are not uniquely related to that jurisdiction." James M.

Underwood, *Rationality, Multiplicity, & Legitimacy: Federalization of the Interstate Class Action*, 46 S. TEX. L. REV. 391, 405 (2004). Professor Underwood characterized the result as an "upside-down concept of federalism," which he found to be "particularly egregious when one considers that these decisions by state court elected judges can have a nationwide impact on how business is conducted in far-off portions of the United States." *Id.* At 405-06.

Because of these systemic risks, the Advisory Committee Report to the Federal Judicial Conference Committee of 2002 reached a "unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems." Underwood, 46 S. TEX. L. REV. at 410, *quoting* Report of the Civil Rules Advisory Committee 311 (May 20, 2002), https://tinyurl.com/RulesComm311 (presented to the Standing Comm. on Rules of Practice and Procedure); *see also* Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. REV 461, 540 (2000) (arguing for expanded removal and multidistrict transfer statutes to minimize risk of overlapping actions).

B. CAFA Created Class Action Safeguards by Expanding Federal Jurisdiction and Removal.

CAFA outlawed many of the worst class action abuses and designed safeguards to protect interstate commerce. For example, CAFA prohibits discriminating among class members based on their geographic location (CAFA § 3(a), codified at 28 U.S.C. § 1714); requires notification of state Attorneys General prior to class settlement (CAFA § 3(a), codified at 28 U.S.C. §§ 1715(b),(d)); requires improved notice to class members (CAFA § 3(a), codified at 28 U.S.C. § 1715(e)); and restricts coupon/no-cash settlements (CAFA § 3(a), codified at 28 U.S.C. § 1712).

While important, these reforms do not apply in state court, where some of the most troubling practices were commonplace. Recognizing that it lacked the power to impose procedural change on state courts, Congress instead chose to expand federal jurisdiction for class actions previously trapped in state court. The Senate Report explained that CAFA aimed to dismantle "a system that allows state court judges to dictate national policy . . . from the local courthouse steps is contrary to the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14 at 24 (2005).

Specifically, CAFA amended 28 U.S.C. § 1332 to grant federal courts subject matter jurisdiction over class actions with 100 or more plaintiffs if "the matter in controversy exceeds the sum or value of $5,000,000,

exclusive of interest and costs[.]" CAFA § 4 (codified at 28 U.S.C. § 1332(d)). A class action satisfies this amount-in-controversy requirement if the combined value of the class members' claims exceeds $5,000,000, whether or not any individual claim exceeds the normal $75,000 threshold for diversity jurisdiction. *See generally* 28 U.S.C. § 1332. Finally, CAFA relaxed the complete diversity requirement in favor of a "minimal diversity" standard requiring only one plaintiff and one defendant from different states. CAFA § 4 (codified at 28 U.S.C. § 1332(d)); *see also generally* Andreeva, 59 U. MIAMI L. REV. at 388-92.

Expanded federal jurisdiction would not help class defendants avoid state court abuses, however, without a corresponding right of removal to federal court. As the Senate Report noted, before CAFA, the "law enable[d] plaintiffs' lawyers who prefer[red] to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court." S. Rep. No. 109-14 at 10 (2005).

To ensure that CAFA's new protections did not remain out of reach, Congress expanded removal in four ways. *See* Lee & Willging, 156 U. PA. L. REV. at 1738. First, the act loosened the defendant consent requirement, allowing "any defendant" to remove a class action. CAFA § 5 (codified at 28 U.S.C. § 1453(b)). Second, it eliminated the home-state defendant rule, permitting removal even when a defendant is a citizen of the forum state. *Id.* Third, it eliminated the one-year removal deadline for eligible class actions. *Id.* And finally, it expanded and expedited appellate review of

remand orders. *Id.* (codified at 28 U.S.C. § 1453(c)); *see also* Lee & Willging, 156 U. PA. L. REV. at 1738.

These provisions leave no doubt that Congress strongly favors removal of large class actions to federal court. This Court has agreed, emphaziaing in *Dart Cherokee Basin Operating Co. v. Owens* that "CAFA's primary objective" was "ensur[ing] Federal court consideration of interstate cases of national importance." 135 S. Ct. 547, 554 (2014). As a result, as this Court held, "no antiremoval presumption attends cases invoking CAFA." *Id.*

C. CAFA Has Transformed Class Actions.

The eight years of "grinding effort" ultimately paid off, leading to substantive and procedural reforms that have successfully transformed class action litigation. "The main point of CAFA was to permit defendants to remove large-scale class action litigation from plaintiff-favored state courts to federal courts. The data suggest that it is doing exactly that, as federal courts have experienced a significant upswing in class actions since CAFA's enactment." Erichson, 156 U. PA. L. REV. at 1607. At the same time, the number of class actions in the former "magnet" jurisdictions has fallen dramatically. For example, class action filings in the Madison County, Illinois Circuit Court fell from 106 in 2003 to only 3 in 2006. *Id.* at 1609-10.

CAFA has largely achieved its central goal. By expanding both federal jurisdiction and removal, CAFA has reduced abusive state court forum-shopping for large interstate class actions.

D. The Third-Party Counterclaim Procedure Evades CAFA's Core Reforms.

Given CAFA's broad success in curbing abuses, it was only a matter of time before savvy plaintiffs' lawyers tried new methods to undermine and avoid CAFA's safeguards. And as the decision below shows, they have achieved some success. But this is just the beginning. If allowed to flourish, the procedural maneuver endorsed below threatens much of CAFA's progress.

Soon after CAFA passed, class counsel hatched plans for a path back to state court. They found a road map in Professor Jay Tidmarsh's article, *Finding Room for State Class Actions in a Post-CAFA World: The Case of the Counterclaim Class Action*, 35 W. ST. U. L. REV. 193 (2007). Offering a framework for adjudicating counterclaim class actions in state court, Tidmarsh declared that "the eulogy for state-court class-action practice is a bit premature." *Id.* at 234. He put this theoretical framework in action, serving as a consultant to the class action counterclaim plaintiffs in at least two of the actions that used the procedural techniques he suggested. *Id.* at 193.

In addition to the Fourth Circuit below, the Sixth, Seventh, and Ninth Circuits have blessed this counterclaim end-run around CAFA. *See* App. to Pet. Cert. 9a; *Tri-State Water Treatment*, 845 F.3d at 355 (prohibiting removal of class action counterclaim by third-party counterclaim defendant); *In re Mortg. Elec. Registration Sys., Inc.*, 680 F.3d at 853) (same);

Westwood Apex, 644 F.3d at 804-05 (same); *Palisades*, 552 F.3d at 334-35 & n.4 (same). And following behind these appellate cases are more and more class actions, filed as counterclaims in state court and then, after removal, remanded back from the district courts on the basis of the original-plaintiff rule. *See, e.g., Hart v. Knockerball MidMo, LLC*, No. 2:18-CV-4147, 2018 U.S. Dist. LEXIS 176624 (W.D. Mo. Oct. 15, 2018); *Williamson v. Commerce Bank*, No. 4:18-CV-00513, 2018 U.S. Dist. LEXIS 169756 (W.D. Mo. Oct. 2, 2018); *Reyes v. Fid. Invs.*, No. 3:18-CV-00134, 2018 U.S. Dist. LEXIS 129885 (S.D. Tex. July 17, 2018); *Wells Fargo Fin. S.C., Inc. v. Mack*, No. 2:18-CV-1479, 2018 U.S. Dist. LEXIS 130764 (D.S.C. July 13, 2018); *Bank of N.Y. Mellon v. Cioffi*, No. 15-13935-FDS, 2016 U.S. Dist. LEXIS 95474 (D. Mass. July 21, 2016).

This case perfectly illustrates the counterclaim maneuver. A consumer purchased a product on credit but failed to make payments. App. to Pet. Cert. 2a-3a. After the creditor brought a simple collection action against the consumer in state court, the consumer asserted a class action counterclaim against the original plaintiff and, importantly, two third parties. App. to Pet. Cert. 2a. Relying on *Shamrock Oil*, 313 U.S. at 108-09, the class action plaintiff managed to defeat removal. App. to Pet Cert. 9a-11a.

It is beyond credible dispute that CAFA would apply if Respondent had filed the class action counterclaim as a standalone complaint. The class defendants would have been able to remove the case and, once in federal court, CAFA's protections would

have applied. Instead, Respondent prompted a collection action and, according to the Fourth Circuit, thereby created CAFA immunity. And the source of that purported immunity? A case long predating CAFA that addressed neither class actions nor third-party defendants: *Shamrock Oil*.

E. This Court, in Deciding *Shamrock Oil*, Could Not Have Contemplated the Coming Class Action Abuses or CAFA's Legislative Fix.

At its heart, *Shamrock Oil* is about preventing forum shopping. The case rests on the premise that a plaintiff who chose a state forum should not gain the right to remove its own case simply by virtue of being later named as a counterclaim defendant. *Shamrock Oil*, 313 U.S. at 107-08. And yet several courts of appeals have ignored this anti-forum-shopping rationale and transformed *Shamrock Oil* into the chief weapon against CAFA, itself a landmark anti-forum-shopping statute.

The *Shamrock Oil* Court could not have foreseen CAFA and its well-crafted, interconnected reforms addressing abusive state court class actions. *Shamrock Oil* involved only two parties and contained no class allegations. Indeed, at the time, Rule 23 of the Federal Rules of Civil Procedure was barely four years old, and it did not yet permit plaintiffs to aggregate low-value, unrelated claims. Fed R. Civ. P. 23 (1937) (amended 1946); *see also* Harry Kalven, Jr. & Maurice Rosenfeld,

The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 702-04 (1941).

Another quarter-century would pass after *Shamrock Oil* before the 1966 Amendments to Rule 23 created the modern 23(b)(3) class action. Fed. R. Civ. P. 23 (1966) (amended 1987). And even then, that new type of class action provoked controversy within the Advisory Committee on Civil Rules. Committee members feared that the procedure of aggregating small claims "might be misused by lawyers who put their own financial or other interests ahead of those of the absent class members or engage in settlements that were not in the best interest of their clients or bring suits that would threaten the economic viability of companies and governmental programs." Arthur Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQUIRIES IN L. 1, 6 (2018).

Few could have predicted where these 1966 Amendments would lead. Professor Miller, then unofficial assistant to the Advisory Committee's Reporter, recently noted that it was "unrealistic to expec[t] that anyone, even those extraordinarily gifted Advisory Committee members, could have predicted the tremendous increase in class actions that followed the 1966 revision or the concomitant changes in their dimension or the ways in which they are processed." *Id.* at 7. He credits "[t]he creation of various new rights of action, the changing orientation and composition of the legal profession, the larger scale and economic stakes of litigation," as well as "the egalitarian composition of Congress and the courts, and the increasingly complex

social and commercial environments [that] provided many new contexts and attractions for using the class action" for the vast expansion of class actions in the coming decades. *Id.* at 8.

If no one could foresee the class action tsunami in 1966, surely the 1941 *Shamrock Oil* decision did not contemplate how the original-plaintiff rule would apply in a post-CAFA world.

F. *Shamrock Oil* Should Not Cabin CAFA's Legislative Solution to Class Action Abuses.

Given the historical contexts of both *Shamrock Oil* and CAFA, this Court should clarify that the 1941 original-plaintiff rule does not apply to class action counterclaims that otherwise satisfy CAFA's removal provisions.

Shamrock Oil addresses a simpler problem from a procedurally simpler era. By contrast, Congress precisely tailored CAFA to address the modern problems of large, interstate class actions trapped in state court. CAFA's mandate favoring federal jurisdiction is clear. This Court recognized as much in *Dart Cherokee*, holding that the act should be "read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart Cherokee,* 135 S. Ct. at 554. Former House Judiciary Committee Chairman James Sensenbrenner would have agreed, as he stated during the floor debate on CAFA that if "a Federal court is uncertain . . . [that] court should err in favor of exercising jurisdiction over the case." 151 Cong. Rec.

H726, H727 (daily ed. Feb. 17, 2005) (Statement of Rep. Sensenbrenner).

This Court should accordingly clarify that the *Shamrock Oil* original-plaintiff rule does not supersede CAFA's jurisdiction and removal provisions.

CONCLUSION

This Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

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November 16, 2018

No. 17-1471

IN THE

Supreme Court of the United States

HOME DEPOT U.S.A., INC.,
Petitioner,

v.

GEORGE W. JACKSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extends to third-party counterclaim defendants.

2. Whether an original defendant to a class-action claim can remove the class action if it otherwise satisfies the jurisdictional requirements of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, when the class action was originally asserted as a counterclaim against a co-defendant.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has regularly appeared before this and other federal courts to support defendants who assert their statutory rights to remove state-court actions to federal court. *See, e.g., Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588 (2013); *Lincoln Prop. Co. v. Roche*, 546 U.S. 81 (2005). In addition, WLF's Legal Studies Division regularly publishes on issues confronting defendants seeking to exercise those rights. *See, e.g.*, Dan Himmelfarb, *Fourth Circuit Ruling Permits Broad Circumvention of Class Action Fairness Act*, WLF Legal Opinion Letter (Apr. 10, 2009).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Congress adopted the Class Action Fairness Act

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing.

of 2005 (CAFA), Pub. L. 109-2, to ensure that state-court class-action defendants could remove their case to federal court when the suit is substantial and raises issues of national importance. *Amici* are concerned that the decision below unduly restricts Congress's intended application of CAFA and invites plaintiffs' attorneys to "game" the system to prevent removal.

STATEMENT OF THE CASE

Congress's purpose in adopting CAFA is expressly stated in the statute. Congress sought to broaden federal diversity jurisdiction over class actions and "to restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). Congress found that class action lawsuits raising issues of "national importance" were being improperly "[kept] out of Federal court," and that state courts were "sometimes acting in ways that demonstrate bias against out-of-State defendants" and otherwise "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." *Id.*, § 2(a)(4).

CAFA states that a class action meeting all other statutory prerequisites may be removed to federal court by "any defendant." 28 U.S.C. § 1453(b). At issue here is whether Petitioner Home Depot U.S.A., Inc. qualifies as a defendant within the meaning of that provision.

This case arises out of a debt-collection action by Citibank, N.A. in North Carolina state court against Respondent George W. Jackson. Citibank alleged that

Jackson failed to pay for a water-treatment system he purchased using a Citibank-issued credit card. Pet. App. 2a.

Jackson's answer to the complaint denied liability. It also included a counterclaim against Citibank and third-party class-action claims (alleging unfair and deceptive trade practices regarding the sale of water treatment systems) against Home Depot and Carolina Water Systems, Inc. *Id.* at 3a. Citibank responded by voluntarily dismissing its claims against Jackson.

Home Depot filed a notice of removal in October 2016, citing federal jurisdiction under CAFA. A month later, Jackson amended his complaint to remove all mention of Citibank. In March 2017, the district court granted Jackson's motion to remand the case to state court. *Id.* at 16a-23a. Relying on Fourth Circuit precedent, the court held that only an "original defendant" qualifies as a "defendant" under the federal removal statutes and thus that Home Depot (which was not named by Citibank as an original defendant) was not entitled to remove the case to federal court. *Id.* at 19a-21a (citing *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008)).

The Fourth Circuit affirmed. Pet. App. 1a-15a. CAFA states that a class action meeting all other statutory prerequisites may be removed to federal court by "any defendant," 28 U.S.C. § 1453(b), but *Palisades* held that a third-party counterclaim defendant does not meet the statutory definition of "any defendant." Because Home Depot was a third-party counterclaim defendant in the action filed by

Citibank, the Fourth Circuit held that Home Depot was not entitled to remove under CAFA. *Id.* at 5a-7a.[2]

The appeals court rejected Home Depot's argument that this Court's 2014 *Dart Cherokee* decision—which declared that "no antiremoval presumption attends cases invoking CAFA," 135 S. Ct. at 554—casts doubt on the *Palisades* decision. *Id.* at 9a-11a. The court conceded that *Palisades* had interpreted CAFA "consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." *Id.* at 10a (quoting *Palisades*, 552 F.3d at 336). But the court denied that applying its strict-construction canon to CAFA was tantamount to adopting the anti-removal presumption disclaimed by *Dart Cherokee*. *Id.* (stating that "it is possible to construe removal strictly without applying an anti-removal presumption.").

Home Depot sought review of the Fourth Circuit's determination that additional counter-defendants may not remove class actions to federal court under CAFA. In granting review, the Court directed the parties to address the following additional question: "Should this Court's holding in *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941)—that an original plaintiff may not remove a counterclaim against it—extend to third-party counterclaim defendants?"

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[2] The Fourth Circuit described Home Depot as an "additional counter-defendant." In its order directing the parties to brief and argue an additional question, this Court referred to Home Depot and similarly situated parties as "third-party counterclaim defendants." *Amici* adopt the Court's terminology.

SUMMARY OF ARGUMENT

This is an easy case. CAFA authorizes removal by "any" class-action defendant. 28 U.S.C. § 1453(b). Home Depot, which was haled into court involuntarily by Jackson, meets any plausible definition of a "defendant." The Fourth Circuit's decision to the contrary does violence to the plain statutory language.

Permitting third-party counterclaim defendants such as Home Depot to remove cases to federal court under CAFA is fully consistent with Congress's expressly stated purposes in adopting CAFA. CAFA provides the federal district courts with original jurisdiction to hear larger class actions involving minimally diverse parties, and it allows both plaintiffs and defendants the option to choose a federal forum for such actions.

Congress found that before the adoption of CAFA, some plaintiffs and state courts had "game[d]" the system to prevent large lawsuits involving diverse parties from being heard in federal court, thereby "undermin[ing] . . . the concept of diversity jurisdiction as intended by the framers." CAFA § 2(a)(4). Jackson's conduct in this case—filing his class claims as a counterclaim in the Citibank collection action rather than as a separate lawsuit against Home Depot, then almost immediately dismissing his claims against Citibank—is precisely the sort of manipulative pleading that Congress determined should not prevent class-action defendants from choosing a federal forum.

The Fourth Circuit concluded that this Court's *Shamrock Oil* decision held that the word "defendant,"

as used in federal removal statutes, applies only to "a defendant against whom the original plaintiff asserted a claim," not to defendant(s) added by a counterclaim filed by the original defendant. Pet. App. 6a. That conclusion misreads *Shamrock Oil*, which said nothing about third-party counterclaim defendants.

Shamrock Oil involved an effort by the plaintiff, following the defendant's filing of a counterclaim, to remove to federal court a lawsuit it initially filed in state court. The then-applicable general removal statute, the predecessor to 28 U.S.C. § 1441(a), provided for removal "by the defendant or defendants therein." The Court held that the statute did not authorize removal by a plaintiff who had voluntarily appeared in the state-court proceeding because "a right of removal [is] conferred only on a defendant who has not submitted himself to the jurisdiction [of the state court]." *Shamrock Oil*, 313 U.S. at 106. That holding says nothing about the removal rights of Home Depot and other third-party counterclaim defendants, none of whom have voluntarily submitted themselves to the jurisdiction of a state court. Indeed, the most natural reading of "the defendant or defendants" to whom removal rights are granted encompasses third-party counterclaim defendants. Moreover, *Shamrock Oil* based its holding on the history and purpose of removal legislation, not on a textualist interpretation of "defendant" or any other specific words in the general removal statute.

The Fourth Circuit noted in its 2008 *Palisades* decision that several federal courts, in the years preceding adoption of CAFA in 2005, held that § 1441(a) (which, like its predecessor, authorizes

removal "by the defendant or the defendants") does not authorize removal by third-party counterclaim defendants. *Palisades*, 552 F.3d at 332-33. Those courts concluded that *Shamrock Oil* had limited removal under § 1441(a) to "original" defendants. *Ibid.* *Palisades* reasoned that Congress, when it adopted § 1453(b) as part of CAFA in 2005, did not intend the "any defendant" provision to extend removal rights to third-party counterclaim defendants because: (1) by 2005, "'defendant' in the [general] removal context [was] understood to mean only the original defendant"; and (2) the word "defendant" in § 1453(b) should be given the same meaning as the word "defendant" in § 1441(a) because "we presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute." *Id.* at 334-35.

The Fourth Circuit's analysis is doubly flawed. First, as noted above, this Court has never suggested, either in *Shamrock Oil* or elsewhere, that third-party counterclaim defendants are not "defendants" permitted to remove lawsuits to federal court under § 1441(a). While a number of lower federal courts had so held prior to 2005, the decisions were not unanimous. Second, neither the text nor legislative history of CAFA suggests that Congress was aware of case law that addressed the removal rights of third-party counterclaim defendants, or intended that its grant of removal authority to "any defendant" should be interpreted narrowly. This Court has generally rejected claims that congressional acquiesce to decisions of the lower federal courts should be inferred simply because Congress amends a statute without addressing issues raised by those decisions.

The Fourth Circuit arrived at its erroneous interpretation of § 1453(b) based in part on its inappropriate bias against removal jurisdiction. The appeals court held that its narrow interpretation of "any defendant" was "consistent with our duty to construe removal jurisdiction strictly and resolve doubts in favor of remand." Pet. App. 7a (quoting *Palisades*, 552 F.3d at 336). That holding directly conflicts with *Dart Cherokee*'s admonition that "no antiremoval presumption attends cases invoking CAFA." 135 S. Ct. at 554. The Fourth Circuit's efforts to distinguish its decision to "strict[ly]" construe § 1453(b) from a forbidden "anti-removal presumption," Pet. App. 10a, are unpersuasive. In both instances, a court places its thumb on the anti-removal side of the scale; *Dart Cherokee* directed the lower courts to cease doing so in CAFA cases.

Because Home Depot is a "defendant" in this case under any plausible definition of that word, it qualifies as "the defendant or the defendants" entitled to remove the case to federal court under § 1441(a). But even if § 1441(a) were properly understood as barring removal by third-party counterclaim defendants, removal would still be authorized under § 1453(b). When it authorized removal under § 1453(b) by "any defendant" in a large class action, Congress signaled its intent that CAFA's removal "provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Dart Cherokee*, 135 S. Ct. at 554 (quoting S.Rep. No. 109-14, at 43 (2005)).

ARGUMENT

I. CAFA AUTHORIZES REMOVAL BY "ANY DEFENDANT," A GROUP THAT INCLUDES THIRD-PARTY COUNTERCLAIM DEFENDANTS SUCH AS PETITIONER

A. Construing the Phrase "Any Defendant" in Accord with Its Most Natural Reading Furthers CAFA's Intent that Federal Court Jurisdiction Should Extend to Virtually All Class Actions

The Fourth Circuit held that a third-party counterclaim defendant is not a "defendant" within the meaning of 28 U.S.C. § 1453(b) and other removal statutes and thus is not permitted to remove cases to federal court under CAFA. Pet. App. 7a. That holding is irreconcilable with both the text and purposes of CAFA.

Home Depot is a "defendant" as that word is commonly understood. The "defendant" is "the person defending or denying; the party against whom relief or recovery is sought in an action or suit." *Black's Law Dictionary* (4th ed. 1968). "In common usage, this term is applied to the party put upon his defense, or summoned to answer a charge or complaint, in any species of action, civil or criminal, at law or in equity." *Ibid.* Home Depot is a party to these proceedings *solely* because it was "summoned to answer ... a complaint" filed by Jackson, and its sole role in these proceedings is to defend against Jackson's claims.

Jackson contends that CAFA adopted a definition of "defendant" that is much narrower than the commonly understood meaning of that term. Yet neither he nor the Fourth Circuit point to anything in the text or legislative history of CAFA to support that contention. This Court expressly rejected arguments that CAFA adopted a specialized definition of the word "plaintiff." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 170-71 (2014).[3] Nothing in CAFA suggests that Congress intended the word "defendant" to be treated any differently.

Indeed, CAFA erased any doubt on that score by including the word "any" (a word that does not appear in other removal statutes), thereby extending removal rights under CAFA to "any defendant." 28 U.S.C. § 1453(b). Congress would not have included the word "any" if it had really intended to adopt a specialized,

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[3] The Court explained:

> [R]espondents assert that "plaintiffs," like "persons," should be construed to "includ[e] both named and unnamed real parties in interest." ... But that stretches the meaning of "plaintiff" beyond recognition. The term "plaintiff" is among the most commonly understood of legal terms of art. It means a "party who brings a civil suit in a court of law." *Black's Law Dictionary* 1267 (9th ed. 2009). ... It certainly does not mean "anyone named or unnamed, whom a suit may benefit," as respondents suggest. ... Congress could of course require a real party in interest inquiry in a statute that uses the term "plaintiff" simply by saying so. *But it has not done that here.*

Id. at 170-71 & n.5 (emphasis added).

restricted definition of the word "defendant."

The Fourth Circuit sought to minimize the importance of the word "any" by asserting that § 1453(b)'s use of the phrase "any defendant" relates solely to the authority of a single defendant to remove a class action without the consent of other defendants and has nothing to say about which parties are granted removal authority. Pet. App. 7a. That assertion does not withstand analysis.

Section 1453(b) states, in relevant part, "**In general**—A class action may be removed to a district court of the United States in accordance with [28 U.S.C.] section 1446, ... except that such action may be removed by any defendant without the consent of all defendants." The Fourth Circuit is correct that § 1453(b)'s final prepositional phrase ("without the consent of all defendants") grants class-action defendants a removal right broader than they would otherwise possess under the general removal statute.[4] But focusing solely on that final prepositional phrase ignores the import of the words "any defendant," which appear immediately prior to that phrase. Congress would not have used the all-encompassing word "any" if it did not intend to convey that removal rights extend to any party that would be understood to be, in common parlance, a "defendant."

Congress would certainly have understood that, if it really intended to adopt a definition of "defendant"

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[4] Outside of the context of CAFA, a case may not be removed to federal court without the consent of all defendants. 28 U.S.C. § 1446(b)(2).

more restrictive than the commonly understood definition that word, its inclusion of the word "any" would be highly confusing because of its tendency to cause readers to conclude that "defendant" is broadly defined. If Congress had intended § 1453(b)'s final clause to be interpreted as understood by the Fourth Circuit (*i.e.*, as focusing *solely* on elimination of the unanimous consent requirement and saying nothing about which types of class-action defendants may exercise CAFA removal rights) it surely would not have used the word "any." For example, it could have written, "...except that removal is permissible without regard to whether other defendants consent." That Congress nonetheless chose to include the words "any defendant" is a strong indication that it intended the word "defendant" to be given its commonly understood definition. And as noted above, that commonly understood definition encompasses third-party counterclaim defendants, who are in court solely because they were summoned to answer a complaint.

Permitting third-party counterclaim defendants such as Home Depot to remove cases to federal court under CAFA is fully consistent with Congress's expressly stated purposes in adopting CAFA: "The purposes of this Act are to ... restore the intent of the framers of the United States Constitution by providing for federal court consideration of interstate cases of national importance under diversity jurisdiction." CAFA § 2(b)(2). Congress effectuated those purposes both by expanding the federal courts' diversity jurisdiction (thereby increasing the ability of plaintiffs to file their class actions in federal court) and by expanding defendants' rights to remove class actions from state court to federal court.

CAFA provides the federal district courts with original jurisdiction to hear a class action if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d). Subject to several narrow exceptions, defendants may remove to federal court any class action over which federal district courts have original jurisdiction. CAFA eliminates significant impediments to removal that exist with respect to non-class actions, including: (1) § 1446(c)(1)'s bar against removing diversity cases more than one year after a suit is commenced; (2) § 1441(b)(2)'s bar against removal by a defendant that is a citizen of the forum State; and (3) § 1446(b)(2)(A)'s bar against removal without the consent of all defendants who have been properly joined and served. 28 U.S.C. § 1253(b). CAFA also grants parties the right to seek review of orders granting or denying a motion to remand. 28 U.S.C. § 1253(c).

Congress adopted CAFA in significant part due to findings that "abuses of the class action device" throughout the prior decade had "undermined public respect for our judicial system" as well as "the concept of diversity jurisdiction as intended by the framers." CAFA §§ 2(a)(2) & 2(a)(4). Its list of "abuses" included findings that "State and local courts are ... keeping cases of national importance out of federal court" and are "sometimes acting in ways that demonstrate bias against out-of-state defendants." CAFA § 2(a)(4). As this Court has recognized, Congress's "primary objective" in adopting CAFA was "ensuring" a federal forum for interstate cases of national importance. *Knowles*, 568 U.S. at 595.

Preventing third-party counterclaim defendants from removing class actions to federal court would be wholly inconsistent with that statutory objective. An interstate class action is of no less "national importance" simply because it was initiated as a counterclaim by an original defendant and not as a claim by the original plaintiff. Nor is there any less danger that a state court hearing the case will "demonstrate bias against out-of-state defendants." It is undisputed that CAFA authorized Home Depot to remove Jackson's class claims to federal court had Jackson chosen to file them in a separate lawsuit rather than as part of a counterclaim to Citibank's debt-collection suit (subject only to any claim that one of CAFA's narrow exceptions to removal applies). There is no plausible reason why a Congress intent on affording a federal forum to significant class actions would have chosen to grant removal rights in the first instance and not the second.[5]

In sum, the text, purposes, and legislative

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[5] Moreover, Congress determined that pre-2005 removal statutes "enable[d] plaintiffs lawyers who prefer to litigate in state court to easily 'game the system' and avoid removal of large interstate class actions to federal court." S.Rep. No. 109-14 (2005) at 10. Congress adopted CAFA in part to "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." *Id.* 7. Jackson's conduct in this case suggests that he engaged in the very sort of gamesmanship that Congress sought to eliminate. Almost immediately after naming both Citibank and Home Depot in his counterclaim, Jackson dropped all claims against Citibank—thereby suggesting that his sole purpose in filing his counterclaim (rather than filing a separate lawsuit against Home Depot) was to prevent Home Depot from removing the class action to federal court.

history of CAFA all support Home Depot's contention that it is included within the category of defendants authorized by CAFA to remove class actions to federal court.

B. Authorizing Removal Under CAFA Is Fully Consistent with this Court's *Shamrock Oil* Decision

The Fourth Circuit was led astray by its misreading of this Court's *Shamrock Oil* decision. It interpreted *Shamrock Oil* as having held that the word "defendant," as used in federal removal statutes, refers only to "a defendant against whom the original plaintiff asserted a claim," not to defendants added to a lawsuit by virtue of a counterclaim filed by the original defendant. Pet. App. 6a. *Shamrock Oil* did not so hold, nor does the opinion say anything suggesting that third-party counterclaim defendants were not among the defendants authorized to remove cases to federal court.

The *Shamrock Oil* removal petition was filed by the original plaintiff in a state-court proceeding, not by a third-party counterclaim defendant. The plaintiff sought to remove the case to federal court after the defendant filed a counterclaim based on an unrelated breach of contract. The then-applicable removal statute (drafted in 1887) provided for removal of a cause of action only "by the defendant or defendants therein." 28 U.S.C. § 71 (1940). The court held that the statute did not authorize the original plaintiff to remove the lawsuit. *Shamrock Oil*, 313 U..S. at 107. It concluded that "a right of removal [is] conferred only on a defendant who has not submitted himself to the

jurisdiction [of the state court]," *id.* at 106, a category that did not include Shamrock Oil, the original plaintiff.

In arriving at its conclusion, the Court focused on a series of amendments to the general removal statutes in the late nineteenth century. The Court stated that Shamrock Oil's status as the original plaintiff would have precluded removal under the law as it existed before 1875. *Id.* at 105-106. It noted that it had ordered remand in a factually similar 1867 case. *Ibid.* In the earlier case, it held that under pre-1875 law, "[t]he right of removal is given only to a defendant who has not submitted himself to [the] jurisdiction [of the state court]; not to an original plaintiff in a State court who, by resorting to that jurisdiction, has become liable under the State laws to a cross-action." *West v. Aurora City*, 73 U.S. 139, 141 (1867). In 1875, Congress "greatly liberalized" removal by among other things permitting any party (including the plaintiff) to remove lawsuits, regardless whether the defendant filed a counterclaim. *Shamrock Oil*, 313 U.S. at 106. But in 1887, Congress largely reinstated the removal provisions that had been in effect before 1875 and, in particular, eliminated the provision permitting removal by plaintiffs. *Id.* Under those circumstances, the Court concluded that Congress in 1887 intended to reinstate pre-1875 removal law (as articulated in *West*) with respect to original plaintiffs against whom a counterclaim had been filed, and to eliminate the plaintiff-removal rights that existed from 1875 to 1887. *Id.* at 108 (stating that "we find no material difference upon the present issue between the two statutes, and the reasoning of the Court in support of its decision [in *West*] is as applicable to one as to the other").

The Court also relied on the legislative history of the 1887 legislation. The Court noted that a House committee proposed eliminating an *original* plaintiff's removal right because:

> [I]t is believed to be *just and proper to require the plaintiff to abide his selection of a forum*. If he elects to sue in a State court when he might have brought his suit in a Federal court there would seem to be, ordinarily, no good reason to allow him to remove the cause.

Id. at 106 n.2 (quoting H. Rep. No. 1078, 49th Cong., 1st Sess., at 1 (1887)) (emphasis added).

In sum, *Shamrock Oil* held no more than that an *original* plaintiff may not remove a case to federal court after the defendant files a counterclaim. It reasoned that the predecessor to § 1441(a) conferred a right of removal only a party "who has not submitted himself to the jurisdiction" of the state court. *Shamrock Oil*, 313 U.S. at 106. As Judge Bybee has observed, *Shamrock Oil* lacks any direct application to a third-party counterclaim defendant, who "has no say in the chosen forum," is "dragged into state court by service of process the same way that any other 'defendant' is brought into court," and "is as much a defendant as if the case had been originally brought against [him]." *Westwood Apex v. Contreras*, 644 F.3d 799, 808 (9th Cir. 2011) (Bybee, J., concurring) (quoting *Ford Motor Credit Co. v. Aaron Lincoln-Mercury*, 563 F. Supp. 1108, 1113 (N.D. Ill. 1983)). Nothing in *Shamrock Oil* supports the Fourth Circuit's holding that Congress intended to ascribe to the word

"defendant" a specialized meaning far more circumscribed than the commonly understood meaning of that term.

C. In Adopting CAFA, Congress Did Not Ratify Lower Courts' Erroneous Interpretation of *Shamrock Oil*

Several federal courts, in the years preceding CAFA's adoption in 2005, held that the general removal statute, 28 U.S.C. § 1441(a),[6] does not authorize removal by third-party counterclaim defendants. Section 1441(a) authorizes removal by "the defendant or the defendants"; those courts held that third-party counterclaim defendants were not encompassed by that phrase. The Fourth Circuit relied heavily on those decisions in concluding that Congress did not authorize removal by third-party counterclaim defendants under CAFA. The Fourth Circuit's reliance on lower-court case law interpreting a separate statute was misplaced.

The Fourth Circuit explained its rationale in its 2008 *Palisades* decision. *Palisades* reasoned that Congress, when it adopted § 1453(b) as part of CAFA in

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[6] 28 U.S.C. § 1441(a) states:

> GENERALLY.—Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

2005, did not intend the "any defendant" provision to extend removal rights to third-party counterclaim defendants because: (1) by 2005, "'defendant' in the [general] removal context [was] understood to mean only the original defendant"; and (2) the word "defendant" in § 1453(b) should be given the same meaning as the word "defendant" in § 1441(a) because "we presume that Congress legislated consistently with existing law and with the knowledge of the interpretation that courts have given to the existing statute." *Id.* at 334-35.

The premise underlying the Fourth Circuit's logic is flawed: there was no widespread judicial consensus in 2005 that "the defendant or the defendants" entitled to remove a case under § 1441(a) was limited to "original" defendants and did not include third-party counterclaim defendants. As explained in detail in the prior section, nothing in *Shamrock Oil* or any other decision of this Court lends support to that viewpoint; *Shamrock Oil* focused solely on the removal rights of original plaintiffs. While the no-removal-by-third-party-counterclaim-defendants position can be fairly labeled the majority position among the limited number of cases in which the issue was raised, it was not unanimous. For example, *Ford Motor Credit* provided a well-reasoned analysis of § 1441(a) and concluded that removal by third-party counterclaim defendants was authorized by the statute:

> Congress, as well as the Framers of the Constitution, created diversity jurisdiction to protect litigants from the prejudices they might encounter in state

> courts against citizens of foreign states. If removal is not permitted here, Ford, a foreign citizen, must defend an action brought by citizens of Illinois in their own state courts. That is exactly the situation where Congress and the Framers intended a litigant to have access to a federal forum.

563 F. Supp. at 1114.

There is a good explanation of why this removal issue was litigated only infrequently before 2005. Plaintiffs' lawyers had at their disposal a ready means of preventing removal of state-law class actions filed in state court. They added extraneous parties to ensure that complete diversity of citizenship did not exist (*e.g.*, including the local retailer in a product-liability claim against an out-of-state manufacturer). *See* 28 U.S.C. § 1332(a) (2004) (no diversity jurisdiction exists over cases in which any plaintiff is a citizen of the same state as any defendant). Even if counsel never intended to pursue the claims against the extraneous, non-diverse defendant, counsel could prevent removal by keeping the extraneous defendant in the case until expiration of the one-year removal deadline. 28 U.S.C. § 1446(c)(1). So plaintiffs rarely had occasion to seek remand on the ground that § 1441(a) did not permit removal by third-party counterclaim defendants. Only after the adoption of CAFA—which eliminated the complete-diversity requirement for class actions—did the issue become a frequent subject of litigation.

Nor does the Fourth Circuit's desire to avoid inconsistent interpretations of §§ 1441(a) and 1453(b)

justify its decision. The two statutes do not contain identical language. Section 1441(a) permits removal "by the defendant or the defendants." Section 1453(c) permits removal by "any defendant." No canon of statutory construction presumes that Congress intended that § 1453(b) be construed in accord with the construction given by some lower federal courts to a different statute that it phrased differently.

Most importantly, there is no evidence that Congress, when it adopted CAFA in 2005, was aware of lower federal-court decisions that had addressed the application of § 1441(a) to third-party counterclaim defendants. The legislative history includes no discussion of the issue—presumably because the gamesmanship undertaken in this case (tacking a class-action counterclaim onto a state-court lawsuit filed against a consumer) was so infrequently employed pre-CAFA.

This Court has generally rejected claims that congressional acquiesce to decisions of the lower federal courts should be inferred simply because Congress amends a statute without addressing issues raised by those decisions. *See, e.g. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) ("As a general matter, ... we have held that these arguments deserve little weight in the interpretive process."); *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation.") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989)). Moreover, CAFA never focused on the

statute addressed by the lower-court decisions (§ 1441(a), the general removal statute) but instead created an entirely new statute that focused solely on removal of class actions. Given the absence of evidence that Congress was even aware of those court decisions, there is no reason to assume that Congress borrowed the non-unanimous judicial interpretation of the phrase "the defendant or the defendants" when employing a different phrase ("any defendant") in a different removal statute.

D. The Decision Below Was Based in Part on an Inappropriate Bias Against Removal Jurisdiction

Underlying the Fourth Circuit's decision to affirm the remand order was its understanding that removal statutes should be construed "strictly" and that all doubts about such issues should be resolved "in favor of remand." Pet. App 10a (quoting *Palisades*, 552 F.3d at 336). That holding directly conflicts with *Dart Cherokee*'s admonition that "no antiremoval presumption attends cases invoking CAFA." 135 S. Ct. at 554. *Amici* urge the Court to reaffirm *Dart Cherokee*'s admonition and to declare further that removal jurisdiction is *never* subject to a strict-construction mandate.

The Fourth Circuit has long held removal jurisdiction in disfavor. *See, e.g., Dixon v. Coburg Dairy*, 369 F.3d 811, 816 (4th Cir. 2004) (*en banc*) ("We are obliged to construe removal jurisdiction strictly because of the significant federal concerns implicated. Therefore, if federal jurisdiction is doubtful, a remand to state court is necessary.") (citations omitted); *Roche*

v. Lincoln Property Co., 373 F.3d 610, 615 (4th Cir. 2004), *rev'd*, 546 U.S. 81 (2005). The Fourth Circuit has carried over that disfavor to CAFA removal cases, *Palisades*, 552 F.3d at 336 & n.5, and to removal cases decided after *Dart Cherokee*. *See, e.g.*, Pet. App. 10a; *Jones v. Wells Fargo Co.*, 671 Fed. Appx. 153, 154 (4th Cir. 2016); *Hurley v. CBS Corp.*, 648 Fed. App. 299, 303 (4th Cir. 2016).[7] Yet its rule of statutory construction derives no support from the historical understanding of removal rights. To the contrary, the Framers contemplated that diversity jurisdiction and removal jurisdiction would play a vital role in our federal system of government.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 486 (2d ed. 1836). Similarly, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the

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[7] The Fourth Circuit is not alone among the federal appeals courts in its disfavor of removal jurisdiction. Indeed, prior to this Court's 2014 *Dart Cherokee* decision, *every* appeals court other than the Seventh Circuit had adopted a presumption against removal of CAFA cases.

Union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included cases "between Citizens of different States" within the "judicial Power." U.S. Const., art. III, § 2, cl. 1.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to out-of-state defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing an out-of-state defendant sued by a resident plaintiff in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). The Supreme Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection

> of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816).

In sum, granting out-of-state defendants broad rights to remove cases to federal court is fully consistent with the federal system of government established by the Framers. It is no more an affront to state courts to permit out-of-state defendants to remove cases to federal court than it is to permit out-of-state plaintiffs to invoke diversity jurisdiction in order to file federal court lawsuits that raise state-law claims.

Indeed, there is little reason to suppose that state court judges are offended when newly filed lawsuits are removed from their courtrooms and transferred to federal court. As one scholar has observed:

> [T]he comity argument appears somewhat contrived in the context of removal. State courts have given little indication that they consider it an affront to their dignity to have a case transferred to federal court. Given the persistent plea by many state courts that their dockets are overcrowded, a far greater concern of state courts may well be that the federal courts will relieve the congestion on their own dockets at the expense of state courts.

Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 660 (2004).

Those who support the notion that removal statutes ought to be strictly construed often point to *Shamrock Oil*, which (as noted above) held that an 1887 amendment to the general removal statute eliminated the removal authority of the original plaintiff in a state-court proceeding. *Dicta* appearing in the final paragraph of *Shamrock Oil* added, "Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for strict construction of such legislation." 313 U.S. at 108. But as the quoted language expressly states, the Court's call for "strict construction" was based on its interpretation of "successive acts of Congress," not on constitutional considerations.[8] Moreover, by stating that federal courts should "scrupulously confine their own jurisdiction to the precise limits which the statute has

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[8] The final paragraph in *Shamrock Oil* was borrowed almost verbatim from the Court's earlier decision in *Healy v. Ratta*, 292 U.S. 263, 270 (1934), which addressed whether the plaintiff in a diversity action had adequately alleged that his claim satisfied the $3,000 amount-in-controversy requirement. That decision makes clear that when *Healy* (and later *Shamrock Oil*) referred to "successive acts of Congress regulating the jurisdiction of federal courts," they were referring to legislation increasing the jurisdictional amount in diversity cases (which was established at $500 in 1789 and gradually increased to $3,000 by 1911). In light of inflation throughout that same period, it may not be entirely accurate to assert (as did *Healy*) that Congress had "narrowed" diversity jurisdiction by increasing the jurisdictional amount. *Id.*

defined," the Court was simply warning against overly expansive interpretations of diversity and removal jurisdiction, not (as does the Fourth Circuit) decreeing that whenever jurisdiction is in doubt, the doubt should be resolved by a remand to state court.

Any congressional policy of strictly limiting removal jurisdiction has long since been abandoned. In the 77 years since *Shamrock Oil* was decided, Congress has repeatedly expanded removal rights, with CAFA being the most obvious example.[9] Recent Supreme Court decisions have decided removability questions solely by reference to the relevant statutory language, without applying any presumptions. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003). *Breuer* turned on the meaning of a potentially ambiguous clause in 28 U.S.C. § 1441(a), the general removal statute. The Court explicitly and unanimously rejected arguments that *Shamrock Oil* required the Court to interpret the ambiguous clause as precluding removal. After noting *Shamrock Oil*'s "strict construction" language, the Court said, "But whatever apparent force this argument might have claimed when

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[9] Other examples of legislation expanding removal rights include Congress's 1965 decision to increase the time period for filing a removal petition from 20 to 30 days following receipt of the complaint. *See* Act of September 29, 1965, 79 Stat. 887; *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 352 n.3 (1999). Congress amended 28 U.S.C. § 1446 in 1988 to simplify the removal process considerably, eliminating the requirement that a "verified petition" be included in the removal papers. Instead, defendants need now only include "a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a). *See* Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642.

Shamrock was handed down has been qualified by later statutory development." *Id.* at 697.

Dart Cherokee held that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." 135 S. Ct. at 554. *Dart Cherokee* focused solely on CAFA issues and thus had no occasion to address whether an "antiremoval presumption" should apply in other contexts. *Id.* (stating that "[w]e need not here decide whether such a presumption is proper in mine-run diversity cases"). Because the two questions presented in this case are more wide-ranging, *amici* urge the Court to reach the issue not addressed in *Dart Cherokee* and declare that an antiremoval presumption is *never* appropriate. Any rule stating that close jurisdictional issues should always be resolved in favor of remand is inconsistent with the Court's frequent admonition that "[j]urisdiction existing, ... a federal court's obligation to hear and decide a case is virtually unflagging." *Sprint Telecommunications, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

At the very least, the Court should admonish the Fourth Circuit to heed *Dart Cherokee*. The Fourth Circuit's contention that its decision complies with *Dart Cherokee* is incorrect. It declared that it has a "duty" to "construe removal jurisdiction strictly and resolve doubts in favor of remand." Pet. App. 7a (quoting *Palisades*, 552 F.3d at 336). The court's efforts to distinguish that standard from an anti-removal presumption are unavailing. When a court resolves all doubts regarding the meaning of a statute (*e.g.*, does "any defendant" really mean *any* defendant,

including a third-party counterclaim defendant?) in favor of removal, its actions are indistinguishable from an anti-removal presumption. In both instances, a court places its thumb on the anti-removal side of the scale; *Dart Cherokee* directed the lower courts to cease doing so.

II. CAFA AUTHORIZED PETITIONER'S REMOVAL WITHOUT REGARD TO WHETHER *SHAMROCK OIL* BARRED REMOVAL UNDER SECTION 1441(a)

Amici urge the Court to resolve the first Question Presented by ruling that the holding in *Shamrock Oil*—that an original plaintiff may not remove a counterclaim against it—does *not* extend to third-party counterclaim defendants. The policies that have led successive Congresses to maintain the removal jurisdiction of the federal courts—including the perceived need to protect out-of-state defendants from bias in favor of in-state plaintiffs—apply just as strongly to third-party counterclaim defendants as they do to any other defendants. Nothing in the Court's case law or the legislative history of § 1441(a) suggests that third-party counterclaim defendants are not among "the defendant or the defendants" authorized to remove cases to federal court.

But regardless how the Court resolves that question, Home Depot's authority to remove this case to federal court under CAFA is not open to serious question. The wording of § 1453(b) (removal "by any defendant") differs significantly from that of § 1441(a) (removal "by the defendant or the defendants") and is more expansive by virtue of its inclusion of the word

"any." Because the wording of the two statutes differs significantly, a ruling in favor of third-party counterclaim defendants under § 1453(b) but against them under § 1441(a) would be fully consistent with "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

Perhaps most importantly, upholding removal jurisdiction under § 1453(b) will prevent plaintiffs' attorneys from engaging in the very sorts of gamesmanship that Congress sought to prevent when it adopted CAFA. Congress adopted CAFA in part to "make it harder for plaintiffs' counsel to 'game the system' by trying to defeat diversity jurisdiction." S.Rep. No. 109-14 (2005) at 10. Filing class actions as counterclaims rather than as original complaints is a well-acknowledged strategy to defeat removal under CAFA. A decision that prevents use of such strategies furthers congressional purpose and is fully consistent with the text of CAFA.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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